U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 28 August 2007

CASE NO. 2004-LHC-0698

OWCP NO. 18-80400

In the Matter of*:*

J.T.,
Claimant,

vs.

GLOBAL OFFSHORE INTERNATIONAL, LTD. and
LIBERTY MUTUAL INSURANCE COMPANY,
Employer and Carrier,

and

KELLER FOUNDATION/CASE FOUNDATION and
ACE USA/ESIS,
Employer and Carrier.

Appearances:

Eric Dupree, Esq.
For Claimant

James Aleccia, Esq.
For Global/Liberty Mutual

Greg Choate, Esq.
For Keller/ACE USA/ESIS

BEFORE: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING TEMPORARY PARTIAL DISABILITY BENEFITS AND HEARING LOSS BENEFITS

This case involves claims arising under the Longshore and Harbor Workers' Compensation Act as amended ("the Longshore Act" or "the Act"), 33 U.S.C. § 901 *et seq.*

Claimant initially filed a claim for benefits under the Act against Global Offshore International ("Global"). On September 8, 2005, I issued an order joining Keller Foundation/Case Foundation Company ("Keller") as a necessary party. Keller's exhibits ("KX") 3 at 3.

A formal hearing was held from June 12 through 15, 2006 in San Diego, California and continued on June 21 and 22, 2006 in San Francisco, California, at which all parties were represented by counsel. The following exhibits were admitted into evidence: Administrative Law Judge's exhibits ("ALJX") 1-3;[1] Claimant's exhibits ("CX") 1-30; Global's exhibits ("GX") 1-34 and 36-39; Keller's exhibits ("KX") 1-5, 7, 11-12.[2] Transcript ("TR") at 33-78, 227, 834-38, 970, 975-84, 1394-95.

At the conclusion of the hearing, the record was left open for the submission of additional evidence and closing briefs. On August 14, 2006, a copy of the hearing transcript was received by this office. On August 23, 2006, Claimant filed a copy of the post-trial deposition transcript of Sharon Friedman, which has been admitted as CX 31, as agreed at the hearing. Claimant also submitted a letter from Dr. David Meyer, dated August 1, 2006, which was admitted into evidence as CX 32. On November 8, 2006, the parties filed their post-trial briefs, which are hereby admitted as ALJX 4-6.[3] Claimant filed his reply brief on the issue of average weekly wage on November 17, 2006, and Global and Keller (collectively, "Employers") filed their reply briefs on November 22, 2006, which are hereby admitted as ALJX 7-9.[4]

In February, March, and April 2007, counsel submitted letters regarding their efforts to settle this case and the decision was put on hold.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations:

1. An employer/employee relationship existed between Claimant and Global during Claimant's work with Global;
2. Global advanced Claimant $7,500.00, and is therefore entitled to a credit against any liability of Global established in this matter;
3. Keller advanced Claimant $10,000.00, and is therefore entitled to a credit against any liability of Keller established in this matter;
4. Claimant's wage rate with Keller was $475.00 per day.

Tr at 6, 16, 32; ALJX 4 at 5; ALJX 5 at 2; ALJX at 3, 5, 23. I accept these stipulations, as they are supported by substantial evidence in the record. *See Phelps v. Newport News Shipbuilding &*

[1] Claimant's Third Amended Pretrial Statement, which was filed on June 24, 2005 and refiled on May 12, 2006, is ALJX 1; Global's Amended Pretrial Statement filed on May 12, 2006 and its Pretrial Statement filed on June 7, 2006 jointly are ALJX 2; and Keller's Pretrial Statement, which was filed on June 7, 2006, is ALJX 3.

[2] Where available, all citations are to the cumulative, Bates-stamped page numbers.

[3] Claimant's closing brief is ALJX 4; Global's closing brief is ALJX 5; and Keller's closing brief is ALJX 6.

[4] Claimant's reply brief is ALJX 7; Global's reply brief is ALJX 8; and Keller's reply brief is ALJX 9.

Dry Dock Co.,16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 (1985).

ISSUES TO BE DECIDED

1. Jurisdiction and coverage for all periods of employment
2. Collateral estoppel and/or res judicata
3. Employer/employee relationship
4. Injury AOE/COE
5. Last responsible maritime employer
6. Date of maximum medical improvement
7. Extent of disability
8. Average weekly wage and compensation rate
9. Section 12 notice
10. Section 13 statute of limitations
11. Entitlement to credit

Tr at 6-33.

SUMMARY OF DECISION

I find that Claimant was a seaman during his employment with Global from 1998 to 2002 and that equitable estoppel does not bar Global from denying Longshore coverage. I also find Claimant was covered by the Longshore Act during his employment with Keller from 1996 to 1997 and that there was an employer-employee relationship between Claimant and Keller during that period. Accordingly, I find that Keller is the last covered employer.

I find that Claimant suffered cumulative trauma throughout his employment that caused, aggravated, or contributed to his upper extremity conditions. I also find that Claimant was exposed to injurious noise throughout his employment that caused, aggravated, or contributed to his hearing loss. Because Keller has not demonstrated what portion of Claimant's injuries is attributable to his subsequent, non-covered employment, Keller, as the last responsible employer, is liable for Claimant's entire disability.

I find that Claimant's upper extremity conditions have not reached maximum medical improvement, and therefore, he is only entitled to temporary disability compensation. Based on his upper extremity restrictions, I find that Claimant is not capable of returning to his usual work. However, I find that Keller has demonstrated, and Claimant has failed to rebut, the availability of suitable alternative employment. I find that Claimant has a retained earning capacity of $326.67 per week as of June 2002. I also find that Claimant is entitled to 13.126 weeks of permanent partial disability compensation based on his 6.563 percent binaural hearing loss.

With regard to his upper extremity conditions, I find that Claimant's average weekly wage is $1,409.66. Thus, he is entitled to temporary partial disability compensation at the rate of $721.99 per week beginning June 26, 2002. He is also entitled to temporary total disability compensation at the rate of $939.77 per week from September 10, 2002 through November 26,

2002, and from December 8, 2004 through January 19, 2005. With regard to his hearing loss, I find that Claimant's average weekly wage is $2,130.64 and his compensation rate is $835.74.

I find that Claimant's claims were not were not untimely noticed under section 12 or untimely filed under section 13. Lastly, I find that Keller is entitled to a credit against compensation owed for the amounts Keller and Global have already paid to Claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Jurisdiction/coverage

Legal Standards

a. Jones Act / Seaman Status Test

Claimant cannot be covered under the Longshore Act if he is a seaman or member of a crew under the Jones Act, as the two acts are mutually exclusive. *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991).

Under *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the following criteria must be met for an employee to be classified as a seaman: (i) the worker's duties must contribute to the function of a vessel in navigation or to the accomplishment of its mission; and (ii) he must have an employment-related connection to a vessel that is substantial in terms of both its duration and its nature.

Under the first prong, a "vessel in navigation" is "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Stewart v. Dutra Construction*, 543 U.S. 481, 496 (2005). In addition, a "vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." *Chandris*, 515 U.S. at 373. Also under the first prong, the contribution requirement "is very broad" in that "[a]ll who work at sea in the service of a ship" are eligible for seaman status. *Chandris*, 515 U.S. 347.

The aim of the second prong of the seaman test is to distinguish between land-based workers and sea-based workers. *Chandris*, 515 U.S. at 538; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997). In determining whether the worker's connection is substantial in duration, "an appropriate rule of thumb for the ordinary case [is that] a worker who spends less than about 30 percent of his [or her] time in the service of a vessel in navigation should not qualify as a seaman" because he is "fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are." *Chandris*, 515 at 371. In determining whether the worker's connection is substantial in nature, the focus is on whether the worker's duties are "primarily sea-based activities" and "inherently vessel related." *Delange v. Dutra Constr. Co.*, 183 F.3d 916, 920 (9th Cir. 1998); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997) (citing *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997); and *Chandris*, 515 U.S. at 368).

b. Longshore Act

If Claimant is not a seaman under the Jones Act, then it must then be determined whether he meets the status and situs tests to be covered under the Longshore Act. Status is governed by section 2(3), which provides coverage for "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." Situs is addressed by section 3(a), which provides coverage "if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

c. Outer Continental Shelf Lands Act (OCSLA)

If Claimant does not satisfy the status and situs tests for regular Longshore Act coverage, he may still be covered under the OCSLA. The coverage provisions of the LHWCA and the OCSLA are separate and not related. *Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987). If a claimant is injured on the Outer Continental Shelf ("OCS") and satisfies the OCSLA status and situs requirements, he is entitled to benefits under the Longshore Act. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The OCSLA situs applies to: 1) the subsoil and seabed of the OCS; 2) any artificial island, installation, or other device that (a) is permanently or temporarily attached to the seabed of the OCS, and (b) has been erected on the seabed of the OCS, and (c) is present on the OCS to explore for, develop, or produce resources from the OCS; and 3) any artificial island, installation, or other device that (a) is permanently or temporarily attached to the seabed of the OCS, and (b) is not a ship or vessel, and (c) is present on the OCS to transport resources from the OCS. *Demette v. Falcon Drilling Co., Inc., et al*, 280 F.3d 492, 497 (5th Cir. 2002).

The OCSLA covers non-seamen who are injured "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the [OCS.]" 43 U.S.C. § 1333(b); *Demette*, 280 F.3d at 498. An employee's activities have been held to be the "result of" these operations if they would not have occurred "but for" the employee's actions in furtherance of the exploration, development, removal or transportation of natural resources from the OCS. *Barger v. Petroleum Helicopters, Inc*., 692 F.2d 337 (5th Cir. 1983); *Recar v. CNG Producing Co*., 853 F.2d 367 (5th Cir. 1988).

General Background on Employment Periods at Issue

This decision covers three distinct periods of employment, each of which involved various assignments and/or projects.

First, Claimant worked for Global from October 1995 through approximately February 1996. His initial assignment was the conversion of a flat deck barge into a derrick barge with

quarters ("DB-1/*Navajo*") in Louisiana. Tr at 141-52, 990. Then, around January 1996, Claimant was assigned to work on the barge *Hercules* for about three weeks in Mobile, Alabama, and then accompanied it to sea in the Gulf of Mexico for two to three weeks. Tr at 152. When that assignment was complete, Claimant's employment with Global was terminated. Tr at 221.

Second, Claimant worked for Keller from July 1996 through November 1997. Claimant worked for Keller on the South Bay Ocean Outfall sewer project for the City of San Diego. First, he worked from the deck of the *Wotan* and other, related barges and vessels installing a temporary platform about three-and-a-half miles offshore. Tr at 186-90, 567, 604. Next, he loaded and unloaded material between the barges and boats and the platform, and outfitted the platform to drill into the subsoil. Tr at 201-218, 577-78, 601. Claimant was also involved in modifying a concrete mixing barge for the project. Tr at 619, 625. Then, at the end of the project, the platform was dismantled and taken back to shore on barges and boats. During the last six months of his work for Keller, Claimant worked in the R.E. Staite Yard, where he loaded and unloaded barges and boats. Tr at 164-65, 175-76, 212-15, 565, 603.

Third, Claimant worked for Global again from March 1998 through March 2002. Around March 1998, Claimant returned to work as a barge foreman for Global on the *Iroquois*, a construction barge. Tr at 224-26, 1023. Claimant worked on the *Iroquois* in the yard in Louisiana for about three weeks doing repairs, maintenance, and modifying the deck. Tr at 223-26. During that time, he was assigned to load material and equipment onto Billy Starbuck's barges and other related material barges. Tr at 1014. Then, he worked on the *Iroquois* while it was being towed for 7 days from Louisiana to Tuxpan, Mexico, and he performed general maintenance and repairs and serviced the equipment. Tr at 235-36, 331-32. Next, he worked on the *Iroquois* for at least 60 days in port in Tuxpan, Mexico, where he loaded equipment onto the barge. Tr at 335. Then, he oversaw the general maintenance of the *Iroquois*, which was laying pipe for 60 days off of Del Carmen, Mexico. Tr at 237-38, 336-38.

Lastly, before the *Iroquois*' mission in Mexico was completed, Claimant was assigned to another barge for about a month and then assigned overseas to the *Seminole*. Tr at 238-39. The parties agree that Claimant was a seaman from that point forward. ALJX 4 at 21; ALJX 5 at 6. Over the following years, he mostly worked offshore, but worked onshore, or in port, about 20 to 30 percent of the time doing modifications to barges or equipment. Tr at 240.

Claimant did not have any seaman's papers during these periods. Tr at 1037.

Claimant testified that throughout his work, there was a pattern and practice in the offshore marine construction industry where employers would try to keep their key personnel and keep them busy between offshore jobs by assigning them to shore jobs or other in-port projects. Tr at 137.

Claimant testified that for every job, the barge has to be modified somewhat to equip it with the necessary equipment for its project. Tr at 139. Claimant testified that when a barge is brought into dry dock to be repaired or modified, "they usually let all the crew go except your key personnel, and the shipyard crews do the job." Tr at 139.

Motions for Summary Decision on Jurisdiction/Coverage

On May 5, 2004, Global filed an amended motion for summary decision ("MSD 1"). On September 20, 2004, Claimant filed his response to Global's motion. On October 13, 2004, I granted in part and denied in part Global's motion for summary decision. GX 18 at 384-391. First, I found that Claimant was not a seaman while renovating the DB-1/*Navajo* in Louisiana. GX 18 at 387-88. Thus, I ruled that Claimant had raised a triable issue of fact as to whether he was a longshoreman for at least part of his employment with Global, which could have contributed to his cumulative trauma injury. GX 18 at 387-88, 391. Furthermore, I found that Claimant worked on the navigable waters of the United States (i.e., he satisfied the situs requirement) for some part of his employment with Global, which could have contributed to his cumulative trauma injury. GX 18 at 390, 391. For these reasons, Global's motion for summary decision was denied as to Claimant's cumulative trauma claim. GX 18 at 388, 390, 391. However, I found that Claimant was a seaman when he was working on the *Seminole* at the time of his March 2002 heart attack, and Global's motion for summary decision was granted as to that heart attack claim. GX 18 at 388-90, 391.

On January 5, 2005, Global filed a second motion for summary decision ("MSD 2"). On March 18, 2005, Claimant filed a response to Global's second motion for summary decision and a cross motion for "Determination of LHWCA Jurisdiction." On March 22, 2005, Global filed its reply to Claimant's response and cross-motion. On May 2, 2005, I issued an order granting in part and denying in part Global's motion and Claimant's cross-motion. GX 18 at 393-402. First, I clarified that my ruling on the first motion for summary decision that Claimant was a seaman when he worked on the *Seminole* at the end of his employment with Global did not mean he was a seaman for his entire period of employment with Global from 1998 to 2002. GX 18 at 396-97. Then, I ruled that there was a triable issue of fact as to whether Claimant's cumulative trauma injury arose out of and in the course of employment. GX 18 at 398. I also found that, because the DB-1/*Navajo* was not a vessel in navigation, Claimant was not a seaman during the time he was assigned to work on it in the fall of 1995; I emphasized, however, that Claimant's status under the Longshore Act during this period remains to be decided. GX 18 at 398-99. I also found that Claimant was a seaman, and thus not covered under the Longshore Act during his assignment to the *Hercules* in 1996. GX 18 at 399-400. I found that there was a triable issue of fact as to whether Claimant was a seaman during his assignment to the *Iroquois* in Louisiana in 1998. GX 18 at 400. Lastly, I found that Claimant's assignments to the ports of Singapore and Indonesia do not meet the situs requirement of the Longshore Act because those ports are not on the "navigable waters of the United States," and therefore Claimant is not covered by the Longshore Act for those assignments. GX 18 at 400-02.

On May 22, 2006, Keller filed a motion for summary decision ("MSD 3"). On May 31, 2006, Global filed a response. On June 1, 2006, I held a conference call with the parties during which I explained that Keller's motion was denied. *See* Tr at 6.

Collateral Estoppel / Res Judicata

Keller asserts that Claimant is barred by res judicata/collateral estoppel from asserting coverage for his heart attack or for any complaints beginning in 2002 during his work on the *Seminole*, because he has been found to be a seaman during those periods. ALJX 6 at 3.

I find that Keller's argument is moot. Although Claimant requested that I reconsider my summary decision rulings denying coverage for the March 2002 heart attack and his work on the *Seminole* in 2002, Tr at 83-84, he respected those rulings and did not attempt to assert coverage for any conditions or periods that I had already excluded. In addition, I find that the fact that Claimant's employment in 2002 was not covered does not preclude him from discussing complaints that he had during that period with regard to his upper extremities and hearing loss.

Similarly, Global also asserts that Claimant is barred by collateral estoppel/res judicata from claiming coverage based on a prior summary decision ruling that Claimant was a seaman during his 1998-2002 employment for Global. ALJX 5 at 36-37.

I find that Global has misconstrued my summary decision rulings. I ruled that Claimant was a seaman while working on the *Seminole*, GX 18 at 388-91, and that his assignments in the ports of Singapore and Indonesia did not satisfy the situs requirement. GX 18 at 399-402. However, I emphasized that coverage for the 1998 to 2001 period must be determined separately for each assignment. GX 19 at 396-97. Thus, Global is incorrect in asserting that Claimant was barred from claiming coverage for the entire 1998 to 2002 period of employment, because certain, earlier assignments during that period, specifically Claimant's work in Louisiana and elsewhere on the *Iroquois*, were still at issue.

Thus, both Keller and Global's arguments for collateral estoppel/res judicata based on my earlier summary decision rulings fail because Claimant did not attempt at the hearing to assert coverage for periods that had already been excluded.

Analysis of Jurisdiction/Coverage for Periods and Assignments at Issue

At the beginning of the hearing, I clarified the time periods and assignments for which jurisdiction/coverage were at issue in this case. Tr at 6-9, 27-28. First, with regard to Claimant's first period of employment for Global, the only remaining issue is whether Claimant had Longshore status during his work on the DB-1/*Navajo*. Second, with regard to Claimant's employment with Keller, the issues to be decided are whether he had situs and status, or in the alternative, whether he was covered under the OCSLA. Third, with regard to Claimant's second period of employment with Global, the issues to be decided are whether Claimant was a seaman while working on the *Iroquois*, and if not, whether he had status and situs. Because the ultimate aim of resolving these issues is to determine the last covered employer, I will address these periods of employment in reverse chronological order.

a. Period 3: Employment with Global from March 1998 – March 2002

Claimant's Testimony Regarding Period 3

Throughout both of his employment periods with Global, Claimant was always a barge foreman, but worked different jobs or assignments. Tr at 136, 240, 990, 1008. Claimant testified that he worked other jobs for Global, including anchor winch operator, tower operator, anchor foreman, tower foreman, boat foreman, rearranging the yard, and renovating equipment on the beach. Tr at 1009. Claimant testified that he told Global's superintendent that he would do anything he was asked, as long as they did not change his pay and kept him as a barge foreman. Tr at 1009.

Around March 1998, Claimant returned to work as a barge foreman for Global and was assigned to the *Iroquois*. Tr at 224, 332. The *Iroquois* was a pipe-laying/derrick barge. GX 37. When Claimant was assigned to it, the *Iroquois* was floating at a yard in Louisiana. Tr at 224. Claimant testified that he signed on as a crew member and barge foreman of the *Iroquois*. Tr at 649-50. However, he was not necessarily using "crew member" in the legal sense. Tr at 654. The barge did not have a crew when he reported to Louisiana. Tr at 224. Claimant testified that as barge foreman of the *Iroquois*, he was responsible for general maintenance to ensure its seaworthy condition and supervising the crew. Tr at 336. He testified that he slept and ate on the *Iroquois*, Tr at 336, but it is not clear if this applies to all phases of the project. Claimant agreed that all of his duties as barge foreman were in furtherance of the mission of laying pipe in the Mexican seabed because "that's what we were there for." Tr at 338.

Claimant was first assigned to the *Iroquois* to do repairs, maintenance, and modifying the deck. Tr at 224-26. Specifically, Claimant was involved in building and installing a pipe rack on the deck to prepare the *Iroquois* for a pipe-laying project. Tr at 225. Claimant testified that this is the type of conversion that typically happens between jobs to make a barge fit for a particular project, and it was possible that the pipe rack was removed after the project was completed. Tr at 228-29. Installing the pipe rack involved fabricating, rigging, cutting, welding, and placing components together. Tr at 229. It took approximately four or five days to install the pipe rack. Tr at 228. In addition to installing the pipe rack, they also placed a pontoon stinger on the deck of the barge and sea-fastened some material barges. Tr at 229, 648-49. The stinger is an apparatus that holds the pipe into a certain position when it is being lowered to the seabed. Tr at 334. Claimant testified that installing the pipe rack and the stinger were essential to the overall mission of the *Iroquois* of laying pipe in Mexican waters. Tr at 334-35.

Claimant worked on the *Iroquois* in the yard in Louisiana for about three weeks, twelve hours a day for seven days a week. Tr at 223, 233, 647.

During that time, he was assigned to load material and equipment onto a barge supervised by a man named Billy Starbuck. Tr at 229, 647, 1014. He testified that "Billy didn't have any crew, so I took some of the riggers off of the barge and some of the yard crew and utilized the yard crane to load materials for a different phase of the job in Mexico, on Billy's barge." Tr at 230. Claimant added, "And then also I took the same crew over and we loaded some material on the material barge, for the same job down in Mexico." Tr at 230. Claimant testified that Billy

Starbuck's barge and the material barge were also going to Mexico, but would be involved in a later phase of the work than the *Iroquois* because they were not "[pipe-]laying barges." Tr at 1015. Some of the workers who helped Claimant with the unloading and loading were land-based employees of Global, and some were crew from the *Iroquois*, because Starbuck did not have a crew. Tr at 648-49, 654. Claimant was not assigned to Starbuck's barge or the other material barge he helped load. Tr at 654-55, 820. Claimant testified that he was not limited to the *Iroquois* and would assist with work on other barges. Tr at 650.

Claimant testified that he was not sure what they loaded or whether it was for the Mexican job, and that they may have loaded stores, equipment, groceries, and material needed to the repair the barge. Tr at 1039-40. This involved unloading material from trucks, and rigging, derigging, and signaling to load it onto the barges. Tr at 231, 650-51. Claimant testified that he personally did this work in a "hands-on" way. Tr at 651. Claimant testified that he used shackles continuously. Tr at 232, 653. Claimant testified that he was exposed to noise from cranes, welding machines, air compressors, and generators. Tr at 232. He testified that the noise exposure during the loading and unloading work "depends on the activity that was going on in that portion of the yard." Tr at 652.

Because Claimant did not testify about this work on Billy Starbuck's barge and the related material barges during his deposition, there was repeated cross-examination about his memory. Tr at 319-25, 342-43, 819-20. However, I found Claimant's testimony credible and decline to find that he invented this assignment to satisfy the jurisdiction requirements.

Claimant testified generally that during his three weeks in Louisiana, he mainly did not wear ear protection but may have used earplugs when he was standing next to a generator or a similar machine. Tr at 652. Claimant testified that generally he does not wear ear protection "because I have to hear my radio." Tr at 652. Claimant used his radio continuously through the three weeks in Louisiana, and as usual, would use the radio and microphone on his right ear. Tr at 657-58. He also testified that the radio has a button that he would usually trigger with his right thumb. Tr at 659.

After the three weeks in Louisiana, Claimant worked on the *Iroquois* while it was being towed for about 7 days from Louisiana to Tuxpan, Mexico. Tr at 233-35, 335, 1026. At that time, the barge only had a skeleton crew of about 60 people, including riggers, the below-deck crew, some mechanics, some electricians, a sculpting galley crew, a couple of crane operators, and a medic. Tr at 233, 332, 1013, 1025. Claimant was third in command on the voyage. Tr at 332. While it was being towed, he performed some general maintenance, repairing and servicing of the equipment. Tr at 235-36, 331-32, 339-40, 1014. Claimant testified that he did not do "a whole heck of a lot [of work.] We didn't have too much of a crew. I more or less just kept an eye on everything that was tied down, and we were in ship-shape." Tr at 234, 1014. Claimant testified, "I would sit up and check the navigation, where we were going, from the tower mostly, and watch what crew we had doing repairs or working on equipment." Tr at 1014. His job duties included cleaning and maintaining the vessel. Tr at 1036. He slept and ate on the vessel. Tr at 1036. He testified that his job duties of conducting maintenance while the barge was under tow were "more or less the same" as when he was on the *Hercules*, but he also acknowledged differences. Tr at 340-41, 1024, 1033-35.

Next, he worked on the *Iroquois* for a couple of weeks in port in Tuxpan, Mexico, where he loaded equipment onto the barge, worked on the stinger, checked the equipment, and performed general maintenance, "making sure that everything was ready to go to work on the laying pipe . . . ." Tr at 235, 332-36. He testified, "We were getting all the equipment ready and doing repairs, whatever was needed on the barge, before we actually went out and did the job." Tr at 1013. Claimant testified that the purpose of loading supplies and crew was to get the *Iroquois* ready for its mission of laying pipe. Tr at 344. When they got to Tuxpan, they picked up the rest of the crew of about 160 to 180 people. Tr at 234, 238, 332-33, 1013. Claimant testified that the crew was picked up in Mexico because they were not needed on the voyage and there are sometimes rules about hiring local workers. Tr at 332-33, 1026. Claimant was responsible for overseeing the deck crew. Tr at 333. He used the same hand tools for this work as his other jobs. Tr at 236. There was also noise exposure. Tr at 237.

Claimant then was off work for 30 days. Tr at 236. When he returned to work, the barge was laying pipe off of Del Carmen, Mexico. Tr at 237-38, 336-38, 344. Claimant oversaw the general maintenance of the *Iroquois* while it was laying pipe. Tr at 237-38, 336-38. Claimant testified that the pipe-laying project was similar to the work he did with the *Hercules*, but he also acknowledged differences. Tr at 1024, 1033-35. Claimant worked for 60 days, and then again had 30 days off to go home. Tr at 238. He was not with the *Iroquois* for the completion of its mission because he had been reassigned by Global to Malaysia. Tr at 338.

Analysis of Jurisdiction/Coverage for Period 3

As noted above, the issues to be decided with regard to this period are whether Claimant was a seaman while working on the *Iroquois*, and if not, whether he met the Longshore status and situs requirements.

Claimant first argues that he was not a seaman while working for Global in 1998 because his work should be analyzed as distinct assignments: preparing the *Iroquois* in Louisiana, loading on Billy Starbuck's barge and material barges in Louisiana, traveling with the *Iroquois* from Louisiana to Mexico, working on the *Iroquois* in a port in Mexico, and working on the *Iroquois* while it was laying pipe off of Mexico. ALJX 4 at 3, 24-26. He asserts that these were changes in his basic assignment, and the substantiality of the connection to the vessel must be evaluated separately for each under *Chandris*. ALJX 4 at 24-25. Thus, Claimant asserts that he was not a seaman or crew member until the *Iroquois* was laying pipe off of Mexico. ALJX 4 at 24. Before that time, he did not have a substantial connection to the vessel and "his duties were those of a ship repair and maintenance worker, whether in port on navigable waters or at sea doing repairs en route, or a person engaged in longshoring operations." ALJX 4 at 24-25. Second, Claimant asserts that he satisfies the status and situs tests because "the modification of the *Iroquois* and the loading of the Starbuck barges were performed aboard those vessels and in the adjoining land areas used for the refitting and loading work." ALJX 4 at 26.

On the other hand, Global argues that Claimant was a seaman during his assignment to the *Iroquois* in 1998. ALJX 5 at 23. His duties in Louisiana and Mexico contributed to its function and the accomplishment of its mission of laying pipe in the Mexican seabed. ALJX 5 at

24-25. The *Iroquois* was a vessel in navigation at all relevant times, and Claimant's connection to the vessel was substantial in duration and nature. ALJX 5 at 26-29. Global asserts that Claimant remained a seaman while working on Billy Starbuck's barge because a seaman does not lose his status when he is temporarily assigned on shore, as long as he performs a substantial part of his work on the vessel. ALJX 5 at 29-30, citing *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 442, 433 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618; *Guidry v. S. La. Contractors, Inc.*, 614 F.2d 447, 453; *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959). Lastly, Global asserts that even if Claimant was not a seaman while working in port in Mexico and off the Mexican shore, he is not covered by the Longshore Act because his injuries did not occur on the "navigable waters of the United States." ALJX 5 at 30-31, citing *Weber v. S.C. Loveland Co (Weber I)*, 28 BRBS 321 (1994), and *Weber v. S.C. Loveland Co. (Weber II)*, 35 BRBS 75 (2001).

Keller asserts that Claimant's work unloading and loading Billy Starbuck's barge and the material barge was an "undisputed reassignment." ALJX 6 at 4, 16-17. Keller asserts the loading of those barges was not related to the job that the *Iroquois* was doing. ALJX 6 at 16-17. Keller also argues that Global should be estopped from arguing no reassignment because it could have obtained testimony about the assignment from Claimant's supervisor, Steve Lambac. ALJX 6 at 17.

As stated above, the following criteria must be met for an employee to be classified as a seaman: (i) the worker's duties must contribute to the function of a vessel in navigation or to the accomplishment of its mission; and (ii) he must have an employment-related connection to a vessel that is substantial in terms of both its duration and its nature. *Chandris*, 515 U.S. 347.

I find that the *Iroquois* was a vessel in navigation during all relevant periods. A barge that has no independent means of propulsion and must be towed may still be characterized as a vessel in navigation. *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385, 387-88 (9th Cir. 1990); *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983). Thus, even though the *Iroquois* was a barge, it is properly considered a vessel in navigation. In addition, a vessel is still considered to be in navigation when it is moored at a dock or undergoing repairs in drydock for a short period of time. *Chandris*, 515 U.S. at 373-74. Thus, the *Iroquois* remained a vessel in navigation when it was undergoing repairs and preparations while floating at Global's dock in Louisiana, when it was traveling from Louisiana to Mexico, when it was undergoing further preparations while floating in port in Mexico, and when it was working offshore in Mexico.

I find that all of Claimant's duties contributed to the function of the *Iroquois* and were in furtherance of the accomplishment of its mission. The mission of the *Iroquois* was to lay pipe in the Mexican seabed. Tr at 225, 334-35, 338. Claimant's work in Louisiana building and installing the pipe rack, placing the pontoon stinger on the deck, and otherwise repairing and modifying the deck were essential to the *Iroquois*' mission of laying pipe in Mexican waters. Tr at 224-29, 334-35. Claimant's work loading Billy Starbuck's barge and the related material barge was also in furtherance of this general mission because those barges were also going to Mexico to work on a later phase of the same job. Tr at 230, 1015. Claimant's work cleaning, maintaining, and repairing the *Iroquois* while it was under tow from Louisiana to Mexico was in

service of that vessel. Tr at 235-36, 331-32, 339-40, 1014, 1036. Claimant's work in the Mexican port loading and checking equipment, working on the stinger, and performing maintenance was explicitly to prepare the *Iroquois* for its mission of laying pipe. Tr at 235, 332-36, 344, 1013. Lastly, Claimant's work overseeing the general maintenance of the *Iroquois* while it was laying pipe was in service of the vessel and contributed to its function. Tr at 237-38, 336-38.

I also find that Claimant's connection to the *Iroquois* was substantial in duration and nature. With regard to duration, "an appropriate rule of thumb for the ordinary case [is that] a worker who spends less than about 30 percent of his [or her] time in the service of a vessel in navigation should not qualify as a seaman . . . ." because he is "fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are." *Chandris*, 515 at 371. Claimant worked on preparing the *Iroquois* for three weeks in Louisiana, then traveled with it from Louisiana to Mexico for about 7 days, readied it in a Mexican port for a couple of weeks before he rotated into his 30 days off, and then returned to work on the *Iroquois* for 60 days while it was laying pipe offshore. Tr at 226, 233-38, 332-38, 647, 1026. For only a short period during the three weeks Claimant was in Louisiana, he worked with some land-based workers loading Billy Starbuck's barge and a related material barge. Tr at 229-30, 647-49, 654-55, 1014. I find that the vast majority of Claimant's time was spent in service of the *Iroquois* and that his connection to the vessel was substantial in duration.

With regard to the nature of the connection, the focus is on whether the worker's duties are "primarily sea-based activities" and "inherently vessel related." *Delange v. Dutra Constr. Co.*, 183 F.3d 916, 920 (9th Cir. 1998); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997). Claimant testified that he signed on as a crew member and barge foreman of the *Iroquois*, and he was responsible for its general maintenance to ensure its seaworthy condition and supervising the crew. Tr at 336, 649-50. He was assigned to, and did, go to sea with the *Iroquois*. The vast majority of Claimant's duties were performed on the *Iroquois* while it was floating at dock or at sea, and were related to maintaining the vessel's general seaworthiness or aiding its specific mission of laying pipe. Thus, because Claimant's duties were primarily sea based and inherently vessel related, his connection to the *Iroquois* was substantial in nature.

The fact that Claimant worked for a short period loading Billy Starbuck's barge and the related material barge does not alter the substantiality of his connection to the *Iroquois*. Under *Chandris*, if the claimant "receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." 515 U.S. at 372. However, the *Chandris* Court was contemplating situations where the claimant's final assignment for the employer before his injury was a wholly new assignment or permanent reassignment to a different type of work than he had previously done for that employer. *Id.* The Court emphasized that there should not be "a 'snapshot test' for seaman status" because a claimant does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured." 515 U.S. at 363. Claimant was directed to help load Billy Starbuck's barge and the other barge because those barges did not have their own crew, but he was never assigned to those barges and he returned to his regular assignment on the *Iroquois*

when he finished loading them. Tr at 229-30, 648-49, 654-55, 820. Thus, I find that Claimant's work loading Billy Starbuck's barges and the related material barge was a brief, temporary project, and not a permanent reassignment. Therefore, Claimant's status cannot be determined based on this project alone.

For all of the above reasons, I find that Claimant was a seaman while working for Global in 1998. Therefore, combining this finding with my prior summary decision rulings, I find that there is no Longshore coverage for Claimant's entire second period of employment with Global from 1998 through 2002.

b. Period 2: Employment with Keller from July 1996 to November 1997

Claimant's and Mr. Muschong's Testimony Regarding Period 2

Second, from July or August 1996 to November 1997, Claimant worked for Keller on the South Bay Ocean Outfall sewer project for the City of San Diego. Tr at 153, 603. Claimant was first hired for three months, but ended up working for seventeen months on various assignments. Tr at 189-90, 567-68, 575.

Claimant worked seven days a week, twelve hours a day. Tr at 816-18, 618-19. The project sometimes ran 24 hours a day, and there was no one doing Claimant's exact job when he was not there. Tr at 816-19.

Claimant was hired to erect a temporary jacket and platform on the sea bed that would assist with drilling for the sewer project. Tr at 209, 603. In the first phase of this project, Claimant worked from the deck of the *Wotan* barge and related barges and vessels to install a temporary work platform about three-and-a-half or four miles offshore. Tr at 186-90, 567, 604. Claimant testified that the *Wotan* had its own crew, aside from the Keller workers. Tr at 200-01. He would take a helicopter, and then a crew boat, out to the work area offshore. Tr at 162-63, 189, 587. Claimant was responsible for the safety of the passengers and equipment on the crew boat. Tr at 164, 166, 202-03. Claimant and the other Keller workers went offshore on a daily basis, and ate and slept onshore, except for lunch. Tr at 163, 188, 203-04, 577-78, 588.

Claimant's duties involved loading equipment from the Imperial Beach pier onto a crew boat and then unloading the equipment from the crew boat onto the *Wotan*. Tr at 162-66, 203-04. Specifically, Claimant himself carried and loaded welding rods, coils of rope, slings, shackles, and toilet paper. Tr at 165-66. Claimant was also involved in rigging and signaling to offload a jacket, which weighed 300 tons, from a barge and set it on the sea floor. Tr at 191-93. Then, there was pile driving to secure the jacket to the sea floor and hold the platform together. Tr at 194. Then, the deck of the platform itself had to be brought out on a barge, rigged, hoisted by crane, and set onto the jacket legs. Tr at 200. Claimant testified that he used essentially the same pneumatic hand tools in the Keller offshore project as on the DB-1/*Navajo*. Tr at 214-15.

During this time, Claimant was also involved in modifying a concrete mixing barge for the project at the R.E. Staite pier. Tr at 174, 180, 619-20, 625. Mr. Muschong, who was the General Superintendent of Field Operations for Keller during the project, testified that the barge

was rented from R.E. Staite and modified by Claimant and other Keller workers specifically for the concrete mixing job and then returned to its previous condition. Tr at 564, 619-20, 624-25.

Next, once the platform was installed, Claimant worked loading and unloading material between the barges and boats and the platform by crane, and outfitting the platform to drill into the subsoil. Tr at 174, 201-218, 577-78, 601. A crane had to be loaded from the *Wotan* onto the platform. Tr at 206-08. Mr. Muschong testified that Claimant worked as a supervisor and rigging engineer on the platform. Tr at 565. Mr. Muschong agreed that machinery and equipment had to be loaded onto the platform for its activities, and that Claimant was involved in the loading and unloading of barges and supply boats running to and from the platform. Tr at 577-78, 608. During this time, there was a shutdown for six to seven weeks to work out problems with the concrete. Tr at 298-99, 568, 575. Claimant testified that Mr. Muschong told him that Keller kept employing him through this period, even though this unloading and loading work did not require someone at his pay rate, so that he would be on staff to take the jacket out at the end of the project. Tr at 298.

Then, at the end of the drilling for the sewer project, the temporary platform was dismantled and taken back to shore on barges and boats. Tr at 176, 212. Claimant was not on the platform when it was dismantled, because he was working in the yard. Tr at 212. Thus, Claimant was not responsible for loading material from the platform onto barges and boats, but he was responsible for unloading the material when it came to shore. Tr at 212-13. During the last six months of his work for Keller, Claimant spent 95 percent of his time working in the R.E. Staite yard, where he personally loaded and unloaded barges, crew boats, and supply boats. Tr at 164-65, 175-77, 212-15, 565, 603. Mr. Muschong testified that he transferred Claimant to the yard because there were too many people working on the platform. Tr at 565. Mr. Muschong asked Claimant if he would take over the yard operations, with the understanding that his rate and agreements would continue. Tr at 569. At the yard, Claimant "would take care of support for things we needed on the platform, such as getting chokers or whatever it might be, and assembling equipment on the barges as we needed it." Tr at 566. Claimant would load supplies onto boats for the platform work. Tr at 597.

Mr. Muschong testified that Claimant was terminated when the job was done because he was hired only for the sewer project. Tr at 570-71. Mr. Muschong testified that all of the employees working on the sewer project were hired uniquely for that project and did not work for Keller prior to that project. Tr at 610.

Claimant testified that while working for Keller he was a hands-on foreman and used his hands every day, including gripping and forceful pushing and pulling. Tr at 345-46. He was also exposed to loud noise and did not wear ear protection. Tr at 346, 987. Mr. Muschong agreed that Claimant was a "hands-on supervisor." Tr at 582. Mr. Muschong testified that he did not think Claimant's work was hard, but he agreed that Claimant was required to use his hands, do forceful pushing and pulling once in a while, do gripping with his hands and fingers, and do very little lifting. Tr at 605-07. Mr. Muschong testified that the machines on the platform generated noise. Tr at 615. He testified that all of the equipment on the platform was "whisperized" to reduce the noise so there was very little noise from running equipment, and that Keller provided ear plugs for employees who wanted them. Tr at 615-16. However, he

conceded that the pile drivers were much louder. Tr at 616. He also testified that the workers would be exposed to noise from pneumatic air tools. Tr at 622-23. Mr. Muschong testified that the engineers sometimes use a hand counter to count the blows of the pile driver. Tr at 618. Mr. Muschong could not recall Claimant wearing hearing protection. Tr at 622.

Claimant testified that all of his activities for Keller were related to the sewer project. Tr at 644. Mr. Muschong agreed that all of Claimant's activities on the platform and the yard were for the sewer project. Tr at 569. Claimant also testified that the platform was for drilling a hole for a riser for the sewer plant, and that it was not for drilling for oil, gas, or other natural resources. Tr at 644-45. Mr. Muschong also described the riser and the purpose of the project. Tr at 566-67. Mr. Muschong denied that they were drilling for any purpose other than the sewer project and denied that they were mining for minerals, searching for oil, or looking for natural gas. Tr at 572. However, he agreed that the drilling necessarily involved removing minerals and resources from the earth. Tr at 623. Mr. Muschong testified that they hit some boulders when they were drilling that they removed, but the boulders were not valuable. Tr at 572-73. Mr. Muschong agreed that some of the boulders may have been brought ashore to document why the drilling project had been delayed. Tr at 576. Keller also submitted contract documents describing the sewer project, KX 6 at 69-77, and a diagram of how the drilling was to be done through the seabed. KX 8 at 82-83.

Mr. Muschong stated that he would defer to Claimant's testimony on a number of issues because Claimant was honest and because Mr. Muschong did not come to the San Diego project until November 1996 and did not closely supervise all of Claimant's activities. Tr at 564, 579, 582, 592, 594, 609, 621, 622. Claimant testified that he would not contest Mr. Muschong's testimony because Mr. Muschong "is a very honest man, he wouldn't lie." Tr at 997.

Analysis of Jurisdiction/Coverage for Period 2

Claimant argues that he is covered by the Longshore Act for this period, because all of his work was "maritime" work within section 2(3) and was performed at covered locations under section 3(a), such that both status and situs are satisfied. ALJX 4 at 3-4, 26-29. First, he argues that his work on the *Wotan* and related barges while constructing the platform was upon the navigable waters of the United States because the location was within 12 miles of the shore. ALJX 4 at 27. Second, he argues that his work on the platform was upon navigable waters because the platform was only temporary, and that his work was maritime in nature because he loaded and unloaded materials. ALJX 4 at 27-28. Third, Claimant's work in the R.E. Staite yard satisfied that status test because he was loading and unloading material and modifying a concrete barge, and it satisfied the situs tests because the yard was "immediately adjacent to navigable waters and regularly used for the purpose of loading and unloading vessels." ALJX 4 at 28. Lastly, Claimant argues that all of his work on the sewer project fell under the general heading of "marine construction" and "harbor work." ALJX 4 at 28.

Global argues that Claimant is covered by the OCSLA, because his work installing the temporary offshore platform was three and a half miles off the California coast and involved drilling into and removing natural resources from the seabed. ALJX 5 at 31. In the alternative, Global argues that Claimant is covered by the Longshore Act because 1) his offshore assignment

involved maritime work of loading and unloading and was performed over navigable waters, ALJX 5 at 31-35, and 2) his onshore assignment involved loading and unloading and modifying barges and was performed at a pier, wharf or terminal adjoining navigable waters. ALJX 5 at 35-36.

Keller first argues that Claimant is not covered by the OCSLA because the sewer platform on which he worked was more than three miles from shore, and his work did not involve natural resources. ALJX 6 at 5. Second, Keller argues that Claimant fails the situs test because he was working on a fixed platform more than three miles from shore. ALJX 6 at 7-8. Keller argues that Claimant fails the status test because construction of sewer structures lacks a significant relationship to navigation or maritime commerce. ALJX 6 at 8-9.

As noted above, the issues to be decided with regard to this period of employment are whether Claimant met the Longshore situs and status requirements, or in the alternative, whether he was covered under the OCSLA.

I find that Claimant is covered by the Longshore Act for this period. First, Claimant satisfied that status test because he was involved in unloading and loading both at the platform and onshore, and he was involved in outfitting and then dismantling the concrete mixing barge. Thus, Claimant's duties were those of a longshoreman or a harbor-worker, and may be properly classified as maritime employment. Second, he satisfied the situs test because this work was all conducted at the platform site three-and-a-half miles offshore, the R.E. Staite yard, or the Imperial Beach pier. Thus, Claimant's work was performed either actually upon the navigable waters of the United States or at a "pier, wharf, . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 3(a). Claimant also satisfied the situs test because during all phases of the sewer project, he did heavy work with his hands that contributed to his cumulative trauma injuries and he was exposed to loud noise that contributed to his hearing loss. Thus, Claimant is covered by the Longshore Act for his employment with Keller.

Although it is not necessary to analyze whether Claimant is covered by the OCSLA, I will briefly explain why I find that Claimant is not covered by the OCSLA. As stated above, to be covered by the OCSLA, a claimant must be injured on the OCS and satisfy the OCSLA situs and status requirements. *Kirkpatrick*, 38 BRBS 27. The OCSLA situs applies to: 1) the subsoil and seabed of the OCS; 2) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it has been erected on the seabed of the OCS, and (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS; or 3) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it is not a ship or vessel, and (c) its presence on the OCS is to transport resources from the OCS. *Demette*, 280 F.3d at 497. The OCSLA status applies to non-seamen who are injured "as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the [OCS.]" 43 U.S.C. § 1333(b); *Demette*, 280 F.3d at 498.

Here, Claimant was working on a temporary platform located three-and-a-half or four miles offshore, which is on the Outer Continental Shelf. Because he suffered cumulative trauma injuries to his upper extremities and hearing loss while working on that platform, he satisfies the situs requirement of the OCSLA. However, Claimant fails to satisfy the status requirement of the OCSLA because the operation on which he was working was not "for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources." Although some rocks and other material were removed from the sea bed, they were not valuable and were only removed to facilitate the drilling for the sewer project. Tr at 572-73, 623. Both Claimant and Mr. Muschong confirmed that all of Claimant's activities were related to the sewer project, which did not involve any mining for minerals, searching for oil, looking for natural gas, or anything else related to valuable natural resources. Tr at 566-69, 644-45. Thus, Claimant is not covered by the OCSLA because he was not engaged in activities within the meaning of that Act. *See Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002) (worker constructing off-coast sewage outfall tunnel on the OCS was not covered by OCSLA because his duties did not relate to explorative or extractive operations involving natural resources).

For all of the reasons above, I find that Claimant was covered by the Longshore Act during his employment for Keller 1996 and 1997.

c. Period 1: Employment with Global from October 1995 – February 1996

Claimant's Testimony Regarding Period 1

In October 1995, Claimant began working for Global as a barge foreman. Tr at 990, 1008-09. Claimant's initial assignment was to participate in and supervise the conversion of a flat deck barge into a derrick barge ("DB-1/*Navajo*"). Tr at 141-52, 990. The work was done in a shipyard in Bayou Black or Houma, Louisiana. Tr at 143-44. The barge was on land, not floating, the entire time Claimant worked on it. Tr at 152, 990. The work was done by shipyard workers and Global employees. Tr at 149. There was no crew assigned at that time. Tr at 990. Claimant stayed in a hotel during the project. Tr at 143, 990. He worked 12 hours a day, seven days a week. Tr at 157-58.

Claimant testified that the repairs and conversion he was doing were necessary to prepare the DB-1/*Navajo* for future missions. Tr at 1015-16. He testified that he believed that the barge was going to Africa when it was ready, but he never went to sea with it. Tr at 142, 990-91.

A major component of the work Claimant did on the DB-1/*Navajo* was installing machinery to get the barge ready to go out to work. Tr at 150-51. The barge also required significant repairs. Tr at 147. The interior of the barge was gutted and three deck levels of living quarters were added. Tr at 141. Claimant assisted in converting the pump room into a machinery room; installing generators; and cutting "deck plates, bulk heads, frames and super structure work." Tr at 141. Claimant's work involved unloading equipment from trucks, loading equipment into the barge's interior, hanging steel, installing piping, securing machinery, and welding. Tr at 148-50, 161. He also assisted with installing steel plates on the refurbished hull. Tr at 148-49, 989-90. Claimant testified that he was mainly responsible for new construction "like bringing in equipment and setting it in place and so forth. But we actually did hook up

some plates and hang them on the side for the shipyard workers. So that would be repair. And to get the material from dockside up on deck for them, utilizing our crane." Tr at 989-90.

Claimant used tools such as come-alongs, chain pulls, impact wrenches, grinders, chipping hammers, grills, hammers, and sledge hammers. Tr at 155. He testified that he always held tools with his left hand and used his right hand for triggering and finer detail work. Tr at 156-57. Claimant also testified that when working under an empty hull, "everything is noisy and vibrating" and can sound "like you had your head in a bucket." Tr at 159. Claimant also testified that he never wore any hearing protection. Tr at 159. He also wore his radio and microphone during this job. Tr at 159.

Then, around January 1996, Claimant was assigned to work on the barge *Hercules* in Alabama for about three weeks. Tr at 152, 991. Then, he accompanied it to sea in the Gulf of Mexico for two to three weeks. Tr at 152. When the assignment was complete, Claimant's employment with Global terminated. Tr at 221.

Claimant's testimony regarding this period of employment was confirmed by the declaration of Kenny Fortner. CX 26 at 517-19.

Analysis of Jurisdiction/Coverage for Period 1

As discussed above, the only issue remaining after my summary decision rulings is whether Claimant's work on the DB-1/*Navajo* met the Longshore situs and status requirements.

Claimant argues that this work is covered by the Longshore Act because he was doing vessel repair and vessel construction work for an extensive modification of the vessel, he was not scheduled to go to sea on the vessel afterward, and the work was done in an area adjoining navigable waters. ALJX 4 at 30. Global appears to concede that this period is covered, except for Claimant's assignment to the *Hercules*. ALJX 5 at 3, 45-46, 55-56. Keller did not address this time period in its brief. ALJX 6.

Because I have already found that Claimant was covered by the Longshore Act during his subsequent employment with Keller, it is unnecessary to analyze whether Claimant was covered during this period. However, I do find that Claimant was covered by the Longshore Act during his work on the DB-1/*Navajo*. First, I find Claimant satisfied the status requirement because he was engaged in ship repair work and loading and unloading activities. Thus, he was performing the work of a harbor worker or longshoreman, and was engaged in maritime employment within the meaning of section 2(3) of the Act. Second, Claimant satisfied the situs requirement because he was working in a shipyard that adjoined maritime waters and was customarily used for loading and unloading purposes. In completing his work on the DB-1/*Navajo*, Claimant did heavy work with his hands that contributed to the cumulative trauma injuries to his upper extremities and he was exposed to loud noise that contributed to his hearing loss. Therefore, Claimant satisfied both requirements and was covered by the Longshore Act for this period.

2. Equitable estoppel

Claimant asserts that Global should be barred from denying Longshore Act jurisdiction based on an employment contract providing for worker's compensation benefits under the laws of the United States as Claimant's exclusive remedy. ALJX 4 at 22-23. This is essentially an argument for the application of equitable estoppel.

The doctrine of equitable estoppel has been applied in Longshore cases. *See, e.g., Dodds v. Mesa Petroleum Co.*, 36 BRBS 299, 303-04 (ALJ)(2002) (denying employer's attempt to relitigate coverage issue through a modification claim based in part on claimant's detrimental reliance on employer's stipulation to coverage in the original case); *Kirkpatrick v. B.B.I. Inc.*, 38 BRBS 27, 32 (2004) (finding that one insurance carrier did not make any representations that it would not seek reimbursement for claims that it had paid, such that other insurance company could not have detrimentally relied); *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113, 199-20 (2002) (finding that employer did not detrimentally rely on claimant's assertion that she did not want an informal conference on the issue of nominal benefits); *Henderson v. Ingalls Shipbuilding Inc*., 30 BRBS 150, 153 (1996) (finding that the record lacked evidence that employer relied solely on the information supplied by claimant in the LS-33 Forms in electing to approve claimant's third-party settlements).

It does not appear that the doctrine of estoppel has been applied in any Longshore cases similar to this case, where Claimant is asserting estoppel based on Global's assurance of coverage in the employment contract. However, Claimant cited a series of state law cases holding that "liability for workmen's compensation may be based on estoppel, not only as regards mutual compliance with the law, but as regards assurance given a workman that he was covered as an employee." ALJX 4 at 23, quoting from *Hall v. Spurlock*, 310 S.W. 2d 259, 261 (Ky. 1957), and citing other cases for the same proposition. Thus, it is unclear whether estoppel should apply to these facts.

If estoppel does apply, it must be determined that Claimant has demonstrated the four required elements. The Ninth Circuit has articulated a four-part test for equitable estoppel in Longshore cases: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury." *Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1996).

Here, the employment contract between Claimant and Global states:

> "Employee is covered for worker's compensation benefits, if any, payable under the laws of the Employee's country of origin, which benefits will be provided by the Employer's insurance carrier and shall be paid as the sole and exclusive remedy for any occupational injury or illness arising out of and in the course and scope of employment under this Agreement." CX 1 at 2.

Applying the four-part test, I first find that there is no evidence proving that Global was aware at that time of Claimant's contract of the "fact" that Claimant was a seaman and not

entitled to Longshore coverage, or the "fact" that it would later assert that Claimant was a seaman and not entitled to Longshore coverage. Second, I find that the contract language is too ambiguous to discern any intent to induce reliance. The most probable interpretation of the contract language is that it was intended to deny any tort liability (i.e., Jones Act coverage), but it could also be interpreted as assuring worker's compensation coverage (although not necessarily Longshore Act coverage). Third, it does appear that Claimant was ignorant of the "facts" surrounding his entitlement to worker's compensation benefits and what Global would later assert about Claimant's entitlement, but it is not clear whether Claimant assumed he was covered by the Longshore Act, the state system, or some other remedy. Fourth and most importantly, Claimant's brief states only that he was "entitled to rely on" Global's purported assurance of Longshore coverage, but Claimant does not claim that he actually did rely on the contract language. ALJX 4 at 23.

Thus, I find that, even assuming that the doctrine of equitable estoppel may be properly applied to these facts, there is insufficient evidence to bar Global from denying Longshore Act coverage based on the language of Claimant's employment contract.

3. Employer-employee relationship

Keller asserts Claimant was an independent contractor, because he was initially hired for three months as an independent contractor and he handled his own tax withholding and health insurance. ALJX 6 at 9.

However, Claimant asserts that he was an employee under all of the established tests because he did not make his own hours, he did not control the details of his work, he did not supply his own tools, he was paid hourly rather than per project or based on the result achieved, he did not have the chance of profit or the risk of loss, and he was told that he would be covered by Keller for worker's compensation purposes. ALJX 4 at 29-30. Similarly, Global also asserts that Claimant was an employee under the three main tests because the work he performed was part of Keller's regular business and was in furtherance of the San Diego sewer project, he did not control his schedule or hours, he believed his supervisors had the right to fire him, he was furnished with all necessary tools, he was not required to present any licenses or certifications to work, he believed he was an employee, and he was paid on a daily basis. ALJX 5 at 38-39.

The Board has identified and approved the use of at least three different tests for determining the existence of an employer-employee relationship in cases arising under the Longshore Act: 1) the "Restatement" test, *Ronan v. Maret School, Inc.*, 1 BRBS 348 (1975), *aff'd mem.*, 527 F.2d 1386 (D.C. Cir. 1976); 2) the "right to control the details of work" test, *Burbank v. K.G.S., Inc.*, 12 BRBS 776 (1980); *Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441 (1978); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052 (1978); and 3) the "relative nature of the work" test, *Haynie v. Tideland Welding Service*, 631 F.2d 1242 (5th Cir 1980); *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248 (5th Cir. 1980); *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997). A judge should apply whichever test is rational and best suited to the facts of a particular case. *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141, 145

n.4 (1981); *Carle v. Georgetown Builders*, 14 BRBS 45, 47-48 (1980) (*Carle I*), *aff'd*, 19 BRBS 158 (1986) (*Carle II*).

The Restatement test considers the following factors: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether the worker is engaged in a distinct occupation or business; (3) the kind of occupation and whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the worker supplies the instrumentalities, tools, and the place or work for the worker; (6) the length of time for which the worker is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating the relation of master and servant; and (10) whether the principal is in business. *Carle I*, 14 BRBS 45.

The "right to control the details of the work" test has four recognized elements: 1) the right to control the details of the work; 2) the method of payment; 3) the furnishing of equipment; and 4) the right to fire. *Tanis*, 19 BRBS at 153; *Burbank*, 12 BRBS at 778; *Wise*, 7 BRBS 1052; *Gordon*, 8 BRBS 441.

The "relative nature of work test" considers 1) the character of the claimant's work, including how skilled it is, how much of a separate calling or enterprise it is, and to what extent it may be expected to carry its own accident burden; and 2) its relationship to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. *Carle I*, 14 BRBS 45.

For purposes of thoroughness, I will apply the Restatement test, which combines most of the elements of the other two tests. First, Keller exercised a significant amount of control over Claimant's work. Claimant testified that he did not control his own schedule or the number of hours he worked each day. Tr at 293-94, 580. Mr. Muschong testified that Claimant worked set hours but would sometimes be asked to work extra hours. Tr at 579-80. Mr. Muschong agreed that Claimant could not choose what days he worked. Tr at 580. Keller also transferred Claimant from working offshore to the Staite yard. Tr at 296-98, 569. Mr. Muschong testified that he, rather than Claimant, had the final say if there was any dispute on the job. Tr at 581. Claimant believed his supervisors at Keller had the right to fire him. GX 27 at 1067-68.

Second, Claimant's title was always barge foreman, Tr at 136, 240, 990, 1008, but this does not constitute a distinct occupation or business and does not even involve a consistent set of duties from job to job.

Third, Claimant worked under the direction of his employer and always had a supervisor or manager. He was under Mr. Muschong's direction on the Keller project.

Fourth, although Claimant was successful in his work due to his experience overseeing projects and his knowledge of offshore operations, his position did not require any specialized skills or training. Keller did not require Claimant to present any licenses or certifications before he began work. Tr at 295.

Fifth, Keller supplied all of Claimant's tools, equipment, and his work locations. Claimant testified that Keller provided him with the tools he needed to perform his work. Tr at 294. Keller handled renting all of the necessary equipment. Tr at 195. Mr. Muschong confirmed that Claimant was not required to provide any tools or equipment for his work. Tr at 581, 615. Mr. Muschong testified that Keller owned the rigging equipment Claimant used to load and unload boats. Tr at 581. Mr. Muschong agreed that Claimant was not required to provide any of his own tools or safety gear. Tr at 581, 615.

Sixth, Claimant was employed by Keller for a significant period of time. Claimant worked for Keller from July or August 1996 to November 1997. The project was initially only to last three months, but lasted 17 months, during which time Claimant was assigned to various projects and tasks. ALJX 6 at 9; Tr at 189-90, 567-68, 575. He also continued his connection with Keller through a job shutdown of six to seven weeks. Tr at 298-99, 568, 575, 584-89.

Seventh, Claimant was paid according to the number of days that he worked on the project, and his daily rate started at $375 per day and was increased to $475 per day. Tr at 185-96, 634, 568. He testified that he did not submit invoices, but rather, someone in Keller's office would submit the paperwork to their main office. Tr at 635. Claimant was not paid based on the completion of the project or accomplishment of a specified result. Claimant did not have an opportunity for profit or a risk of loss based on his work.

Eighth, Claimant's work was part of Keller's regular business of the employer. Keller was working to install a riser for the San Diego sewer project, and Claimant was employed specifically to work on that task. Tr at 209, 603, 610.

Ninth, Keller made some attempts at not creating an employee-employer relationship, but on the whole, treated Claimant as an employee. Keller designated Claimant as an independent contractor on his payroll and tax documents. Mr. Muschong testified that Claimant was hired as a consultant under a contract. Tr at 567. However, Mr. Muschong conceded that he did not know anything about Claimant's contract with Keller and he would defer to others on that issue. Tr at 609. Claimant was given a 1099 tax form, rather than a W-2 form, and told he had to take care of his own taxes. GX 27 at 1067; Tr at 186, 635-38. Claimant also obtained his own health insurance while working for Keller. Tr at 636-37. There were no other deductions for Social Security or 401K either. Tr at 637. Despite this, Claimant believed he was an employee of Keller. GX 27 at 1067. Claimant also believed, based on communications with a Keller representative (either Leon Lumson or Jim Epshire) that he would be covered by Keller for worker's compensation benefits if he was injured at work. Tr at 635, 989.

Tenth and lastly, Keller is in business and regularly employs workers.

Based on all of the above, I find that there was an employer-employee relationship between Keller and Claimant.

4. Last responsible employer

Based on the resolution of issues above, I find that Keller is the last covered employer. However, whether Keller is the last responsible employer depends upon whether there is substantial evidence that Claimant's employment for Keller caused, aggravated or contributed to his injuries. Global and Keller each assert that the other employer should be the last responsible employer based on the fact that Claimant's injuries were aggravated by subsequent covered employment. ALJX 5 at 46-47; ALJX 6 at 12.

In cumulative trauma cases, the responsible employer is the last employer to have subjected the claimant to trauma that combined with, aggravated, or accelerated his condition. More specifically, "If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible." *Foundation Constructors v. Director*, 950 F.2d 621, 624; *Kelaita v. Director*, 799 F.2d 1308 (9th Cir. 1986). In the event that a subsequent employer who also contributed to the disability is not covered by the Act, the earlier employer covered under the Act may not escape liability for compensation. *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159, 162 (1991); *Todd Shipyards v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983). Thus, the responsible employer is the last employer that is subject to Longshore coverage and contributed to the claimant's injuries.

I found above that Keller was the last covered employer. In addition, as will be discussed further below, I find that Claimant suffered cumulative trauma that contributed to his upper extremity conditions throughout his employment. Thus, Keller is the last covered employer to have contributed to his injuries and is therefore liable for all of his injuries.

In hearing loss cases, the responsible employer is the last employer to expose the claimant to injurious noise before the determinative audiogram. *Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 961 (9th Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP* [*Taylor*], 133 F.3d 683 (9th Cir. 1997); *Port of Portland v. Director*, 932 F.2d 836, 840-41 (9th Cir. 1991); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163-64 (1992). The Board has defined the "determinative audiogram" as the audiogram that "best reflected the loss of hearing caused by claimant's employment with the responsible employer," *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 208 (1991), and the one which is "the best measure of the claimant's occupational hearing loss." *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118, 125 (1991).

The first hearing test in the record is an audiogram that was performed on February 13, 2001 by M. Dusa, M.A., CCC-A. GX 13 at 252; CX 3 at 154, 320. The second, and final, audiogram in evidence is the audiogram performed on April 13, 2004. GX 7. The audiogram was conducted by Elizabeth Allsgaard, MS, CCCP, on appropriately calibrated equipment. GX

7 at 61. The audiogram was evaluated by Dr. Paul Goodman, a board-certified otolaryngologist. GX 7 at 66. Dr. Goodman issued a report on April 20, 2004 based on the April 13, 2004 audiogram. GX 7. Dr. Goodman noted in his report, "Approximately eight years ago, [Claimant's] hearing was checked on an annual physical examination and he was found to have left-sided hearing loss. This was the first time a hearing loss was noticed. Since then, his hearing has decreased on a yearly basis." GX 7 at 62. Dr. Goodman also noted, "Two years ago, [Claimant's] hearing loss was tested and he was found to have sensorineural hearing loss in the left ear, with no specific etiology." GX 7 at 62. However, there is no other record in the parties' exhibits of these prior hearing tests.

Between the 2001 audiogram and the 2004 audiogram, I find that the 2004 audiogram is the determinative audiogram. This is based on the facts that the 2004 audiogram was performed in compliance with section 702.441(d) of the regulations, accompanied by an explanatory report, and generally consistent with the results of the 2001 audiogram. However, I note that whether the 2001 or 2004 audiogram is considered the determinative audiogram is immaterial to the issue of the last responsible employer in this case because Keller was the last covered employer to expose the claimant to injurious noise prior to both audiograms.

5. Causation

Since I determined above that Keller is the last covered employer, I now focus on whether Claimant's employment for Keller caused, aggravated, or contributed to his injuries.

Injuries at Issue

Claimant filed a claim for compensation on February 24, 2003, alleging "cumulative trauma and work exposures resulting in bilateral carpal tunnel syndrome, arthritis, mental stress, excessive work hours and travel, industrial noise exposure." GX 1 at 1. Claimant described the nature of his injury as "hearing loss, blood clot, heart attack, arthritis, carpal tunnel syndrome, tendonitis," and indicated that the date of his injury was March 28, 2002. As discussed above, I ruled on summary decision that Claimant's March 2002 heart attack was not covered. GX 18 at 388-91. At the beginning of the hearing, I stated that the potential injuries for decision were "hearing loss, blood clot, arthritis, bilateral carpal tunnel syndrome, tendonitis, and pterygium," and Global and Keller objected to the pterygium and the blood clot. Tr at 9-10. I ruled that Claimant's newly-raised shoulder, eye, and knee conditions would be excluded from this decision. Tr at 89, 252-56, 656. I stated that Claimant must file a new claim for these conditions. Tr at 91, 99.

Thus, the relevant injuries or conditions to be decided are 1) hearing loss from industrial noise exposure and 2) upper extremity conditions (bilateral carpal tunnel syndrome, bilateral arthritis, and bilateral ulnar nerve entrapments) from cumulative trauma.

Legal Standard for Causation

Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. § 920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). However, a claimant is entitled to invoke the presumption if he or she presents at least "some evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

Once the section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). In weighing medical evidence concerning a worker's injury, a treating physician's opinion is usually entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998).

A. Causation of Upper Extremity Conditions

Claimant has been diagnosed with bilateral carpal tunnel syndrome, bilateral arthritis of the thumb/wrist/hand, and bilateral ulnar nerve entrapment, as well as variations on those diagnoses. CX 3; CX 17; GX 4; GX 5; GX 10; GX 13; KX 4. There is no dispute among the medical practitioners in this case as to the correctness of these three diagnoses. Tr at 709-11, 788-89. Thus, it is not necessary to analyze whether Claimant has suffered these injuries, only whether they are related to his work.

Claimant's Testimony Regarding His Upper Extremity Conditions

Claimant testified that in his career he has been criticized for doing too much physical work with his crew. Tr at 192-93. He testified that he got his hands dirty by doing work himself on every job. Tr at 193, 231. Claimant testified that he used his hands every day in his work. Tr at 157. He testified that "[t]here's nothing easy on a barge," and it is "[p]retty strenuous work." Tr at 157. Claimant testified that the heavy equipment he used was generally the same

throughout his career. Tr at 199. Claimant testified that he always held tools with his left hand and used his right hand for triggering and finer detail work. Tr at 156-57. Claimant also testified that when he was being elevated in a basket or rope ladder, he would always hang on tightly with his left hand and keep his right hand free to use the radio and give signals. Tr at 195, 217-19.

Claimant testified that he first had hand complaints in 1995, but it was "a different hurt in my hands than when I experienced the carpal tunnel." Tr at 661. Claimant testified that he had complained of hand problems in 1999. Tr at 315-16. However, he testified that "The pains before, prior to finding out I had carpal tunnel, were pains that were stiff and hurting when I lifted things at work. When I went to Dr. Subin, I went there with different pains, because of my hands tingling, going numb, aching me, waking me up . . . . It was different pains, different symptoms." Tr at 316. Claimant testified that he has always been truthful with his medical providers and would have answered truthfully if he had been asked if he was having hand complaints. Tr at 243.

Claimant did not complain of any hand symptoms or any other physical problems while he was working for Keller. Tr at 244. He did not have any serious complaints or injuries while working for Keller. Tr at 633-34. Mr. Muschong testified that Claimant did not report any injuries, act injured, have any bodily problems or complaints, or request any accommodations. Tr at 569-71, 614.

Claimant testified that he first experienced carpal tunnel symptoms of numbness and pain waking him up at night about eight months prior to his heart attack in March 2002. Tr at 661. However, Claimant testified that he told Dr. Subin that his hand symptoms started about eight months before that examination, which was in August 2002. Tr at 314-15.

Claimant testified that when he was working for Global he asked the medic on the barge why his hands were going numb, aching, and waking him up at night. Tr at 244-45. Claimant could not recall what barge he was on or where he was on the barge when this conversation occurred. Tr at 245, 351-53, 355, 661. He testified, "I don't remember, but I believe it was probably on [barge] 264. Because I knew that medic better that I knew the one on the *Seminole*." Tr at 353. He did not recall the medic's name. Tr at 357. He conceded that he did not ask the medic for treatment. Tr at 356. Claimant testified that he did not like to complain about all of his aches and pain because it could jeopardize his job. Tr at 245. He stated, "you get aches and pains all the time, you just work through them. But I don't like to be a complainer. Unless there's something seriously wrong, I'm not going to say nothing about it." Tr at 245.

Claimant testified that when he was having aches and pains in his hands toward the end of his work for Global, "I thought it was related to my heart, to tell you the truth. The numbness I thought was some kind of circulation problem related to my heart. Because I knew I already had that heart attack in '99, and then my hands would go numb and ache. But I just thought it was a circulation problem with my blood." Tr at 246, 356.

Claimant believed that he did not bring up his hand problems until after Dr. Meyer told him he was finished treating Claimant's heart. Tr at 358. He testified that after Dr. Meyer told him his heart condition was resolved, he asked why his hands and arms still hurt and was told

that he should see another doctor because those problems did not relate to his heart. Tr at 246, 356. Claimant testified that he then went to Dr. Harless, who sent him to a blood doctor and then a nerve doctor, who referred him to Dr. Subin. Tr at 246. Claimant testified that he went to Dr. Subin as soon as he could get an appointment. Tr at 247. Claimant testified that between late March 2002 when he was released from the hospital after his heart attack and when he asked Dr. Meyer about his hands in May or June 2002, he did not engage in any activities, use his hands in a repetitive fashion, or go fishing. Tr at 292.

Medical Evidence Relating to Causation of Upper Extremity Conditions

Dr. Subin

Dr. Subin is Claimant's treating physician for his hands. Tr at 361-62, 1020; GX 26 at 986. He would not testify at the hearing, but testified by deposition. Tr at 459, 1017. Dr. Subin has been an orthopedic surgeon specializing in surgery of the hand for 35 years. GX 26 at 964.

On August 12, 2002, Dr. Subin noted that Claimant "has had numbness and tingling and aching in his hand for as long as perhaps eight months." CX 3 at 20, 211, 218; GX 10 at 77, 79, 128. Dr. Subin's impression was bilateral carpal tunnel syndrome. CX 3 at 21, 212, 219.

On June 20, 2005, Dr. Subin inquired "on the record" into Claimant's work history from 1996 to 2002. CX 17 at 450. Dr. Subin noted, "In the presence of the patient, I am inquiring regarding his occupation from the period of time of 1996 through 2002. The patient, at that time, was a barge foreman, beginning in 1996 and to that time he had been a barge foreman as far back in time as 1975. His work consisted of supervising and construction of off-shore platforms and pipelines." CX 17 at 450. Dr. Subin continued, "His duties at that time, would include anchoring heavy barges adjacent to his barge, working with cranes and lifting materials from one source to another. This involved utilizing a crane whose capacity was 5,000 tons, and construction of platforms and rigging. The amount of climbing up and down is involved constantly in order to maintain the proper anchorage of the barge and to supervise the construction of platform and the function of the crane. This also involved the constant use of tools, jack hammers includ[ing] many hand tools of all kinds. These activities continued on a constant basis from the period of 1996 through 2002, when the patient was MedEvaced because of a medical condition involving his heart." CX 17 at 450.

Dr. Subin testified by deposition on June 30, 2005. GX 26. Dr. Subin testified, "I am the treating physician, and my primary reasons for being involved with [Claimant] was to treat him." GX 26 at 986. Dr. Subin emphasized that he had no "role" in the case, and that "in being involved in the legal aspects of it, I'm trying to give only my opinion as to what may or may not have affected [Claimant] having the problem with his wrists." GX 26 at 986. He stated that he did not author any reports on causation because it was not relevant to Claimant's treatment. GX 26 at 997. Dr. Subin testified that he billed Claimant's treatment as "non-work related," but that was for health insurance purposes and has no significance as to causation. GX 26 at 998.

Dr. Subin testified that Claimant told him that in 1996 and 1997 he was an independent contractor and "most of his work was of a consultative nature." GX 26 at 979. Dr. Subin

testified that he understood that Claimant's work for Global in 1995 and 1996 "was of a very heavy nature, requiring lifting, carrying, climbing up and down ladders involving transfers of heavy equipment, operating cranes, and doing things that would require a considerable amount of upper extremity physical work." GX 26 at 980-81. Dr. Subin testified that he did not recall as much about Claimant's work during the 1998-2002 period but that "I believe that his reference was to being more in a supervisory capacity, but that as a supervisor, he still had to climb, going up and down ladders. He still had to assist at times with heavy and arduous work, but that he was more in a supervisorial position at that time." GX 26 at 983. Dr. Subin stated, "[Claimant] indicated to me on a number of occasions that as a supervisor he still had to bail in and help when certain things came up." GX 26 at 1005.

Dr. Subin opined that "there is a possibility" that Claimant's very intense work for Global for 3 months in 1995 and 1996 "could have a minor effect on the development of the carpal tunnel." GX 26 at 987. Dr. Subin stated, "I think that there is a possibility with reasonable medical certainty that this may have been a minor contributing factor to the patient's development of carpal tunnel." GX 26 at 995. Dr. Subin speculated that "heavy work may have caused swelling in the wrist, may have irritated the nerve to the point that it became, as time passed, more susceptible to additional injury." GX 26 at 1011. Dr. Subin could not opine on whether this was a minor contributing factor or a temporary flare-up because he did not know if Claimant "had ongoing, very minor symptoms after that for years." GX 26 at 995. Dr. Subin emphasized that Claimant's work in 1995 and 1996 would be "only a minor contributory factor" "[b]ecause of the length of time before the more significant manifestation of carpal tunnel occurred." GX 26 at 992. When asked about the delay in time from his 1995-96 work to when his symptoms manifested themselves, Dr. Subin opined, "It's possible just like many patients with carpal tunnel, the symptoms are very mild and there. They attribute it to fatigue, they attribute it to other things, and they ignore them. And sometimes they are there for a number of years before they become so manifested that it becomes a surgical necessity." GX 26 at 993. Dr. Subin testified that his opinion was based on Claimant's "hard and arduous work. It's conceivable that swelling in the wrist and hand and the irritation of the tendons and activities that he was engaged in might possibly have begun a problem, even though it may not have become much more manifest until sometime in the distant future when he was doing perhaps additional work that brought it on even more." GX 26 at 987. Dr. Subin testified that this opinion was not based on specific medical literature, but was based on his years of experience as a hand surgeon dealing with carpal tunnel patients on a regular basis. GX 26 at 988, 995-96.

Dr. Subin could not opine about whether Claimant's 1996 and 1997 work for Keller contributed to his carpal tunnel syndrome because he did not know the nature of the work. GX 26 at 999. However, Dr. Subin testified, "If it involved any type of arduous work, then yes, it can be another factor contributing to the development of carpal tunnel." GX 26 at 999. Dr. Subin testified that Claimant's work for Global from January 1, 2002 to March 28, 2002 "probably did aggravate an underlying condition and made it more clinically evident" based on what Claimant told him he did in that job. GX 26 at 1006-07. Dr. Subin also testified that just using one's hands in daily living can contribute to carpal tunnel syndrome "but there are some people that are just predisposed to carpal tunnel, and it's based on the anatomy of the carpal tunnel." GX 26 at 999. However, he testified that he had not formulated any opinions on whether Claimant was predisposed to carpal tunnel. GX 26 at 1000.

Dr. Subin testified that alcohol could be a contributing factor for carpal tunnel in "extreme intake" situations, but he could not opine on whether alcohol influenced the development of Claimant's condition without knowing his consumption amounts. GX 26 at 1000-01. He testified that other nonindustrial causes of carpal tunnel included pregnancy, diabetes, fluid retention caused by salt intake, distal radius fractures, and "many different things that compromise the space through which the nerve travels." GX 26 at 996, 1001. Dr. Subin could not recall whether he had inquired whether Claimant's carpal tunnel might have been caused by one of these other factors. GX 26 at 1002. Dr. Subin stated, "in his initial visit on the 12th of August, 2002, the only illness that he indicated to me was heart disease. He also said that he quit smoking two years previously and that his alcohol intake was seldom." GX 26 at 1002.

Dr. Subin testified that Claimant told him he had numbness and tingling in his hands for "at least several months to maybe as many as six months or a year" prior to his March 2002 heart attack but did not pay much attention to or seek treatment for these symptoms until he realized that they were persisting after he had recovered from his heart attack. CX 26 at 988-89, 993-94. However, Dr. Subin agreed that he would construe Dr. Meyer's June 28, 2002 letter to mean that the symptoms of carpal tunnel syndrome manifested themselves after May 15, 2002 when Claimant was released from a cardiac standpoint. GX 26 at 990. Dr. Subin could not recall any medical records documenting carpal tunnel symptoms prior to May/June 2002. GX 26 at 991, 993. When asked about why Claimant's symptoms did not arise until after he was released by Dr. Meyer, Dr. Subin testified, "My only explanation for that is that the patient was concerned with his heart problem, and the numbness and tingling in his hand may have been minor [compared] to the problem of his heart to the point where he wasn't aware of it until after his heart was better and he was still noticing that something else was going wrong." GX 26 at 1008.

Dr. Subin testified about the declaration he signed in support of Claimant's motion for summary decision. GX 26 at 1002. He confirmed that he had discussed with Claimant his job duties on numerous occasions and "I wouldn't say that I went into great detail but he indicated to me that the work was hard, heavy and that he had to use his hands for a lot of the work that he did." GX 26 at 1004. Dr. Subin also confirmed that he would still agree with his declaration that Claimant's symptoms are attributable to cumulative trauma and all of his employment throughout the years would have contributed in some fashion to his ultimate development and resulting disabilities. GX 26 at 1005.

Dr. Subin testified, "It is possible that each [period of employment] had a portion of responsibility for the continued irritation of his carpal tunnel symptoms. It doesn't necessarily mean that . . . each one contributed more and more. It may have been that they continued the initial problem on a subclinical basis for some time." GX 26 at 1006.

Dr. Subin testified that he disagreed with the opinions of Dr. London and Dr. Farran that Claimant's carpal tunnel was not work related. GX 26 at 1007. He disagreed "[b]ecause of the nature of the work that he was doing and the period of time prior to the development of the carpal tunnel he was involved in using his hands; and as a barge foreman, by the things that he told me he had to do, . . . I think that that would aggravate the condition." GX 26 at 1007.

However, Dr. Subin agreed that the opinions of Dr. London and Dr. Farran were "reasonable" based on their respective impressions. GX 26 at 1008-10.

Dr. Gillick

Dr. John Gillick testified on Claimant's behalf as an expert in occupational medicine and preventative medicine. Tr at 411-30, 440; CX 13; CX 25. Dr. Gillick estimated that he has evaluated and treated approximately 250 people with symptoms of carpal tunnel over the past 10 years, including 100 to 150 people diagnosed with carpal tunnel. Tr at 426. Dr. Gillick testified that he himself has had problems with carpal tunnel and osteoarthritis in his hands. Tr at 430-32. Dr. Gillick based his opinions on all of Claimant's relevant medical records and x-rays, including from Dr. Subin; the depositions of Dr. London, Dr. Farran, and Dr. Ohayon; photographs of Claimant working; and interviews with Claimant. Tr at 432-34. Dr. Gillick also spoke with Dr. Subin about Claimant's conditions and his employability. Tr at 456. Dr. Gillick examined Claimant on October 26, 2005. Tr at 470- 71. He also examined Claimant on June 9, 2006, one week before trial, but this testimony was not allowed. Tr at 434-39. He also reviewed the relevant medical literature. Tr at 440-42.

Dr. Gillick issued a report on October 31, 2005 based on his October 26, 2005 examination of Claimant. CX 12; Tr at 470-71. Dr. Gillick noted that Claimant "has been a rigger, pile driver work[er], oil rigger, oil platform worker, and barge foreman for most of his career. Through most of his career except for in early 1990 he had no injuries that were significant enough for him to seek medical care or that he would complain about. He has pretty much stayed away from physicians most of his life." CX 12 at 416. Dr. Gillick opined that Claimant's March 2002 heart attack "put into motion a series of events that has continued [Claimant's] disability. In the recovery period after the myocardial revascularization, he became increasingly aware of an underlying wrist and hand numbness and tingling. The numbness and pain in his hands and wrists was suspected to be carpal tunnel syndrome. These symptoms were further investigated." CX 12 at 417. Dr. Gillick continued, "[Claimant] was documented to have significant median nerve entrapment in both carpal tunnels. There was also a significant osteoarthritis of the bilateral wrist-thumb joints (MCP). Both of these conditions are recognized and widely accepted to be resultant from cumulative trauma over many years of abuse." CX 12 at 417. Dr. Gillick also noted, "He has had some numbness on the outer side of his left arm to the small and right finger since an elbow injury and drainage of elbow hemarthrosis in the early 1990's. This is unchanged and has not affected his work duties." CX 12 at 420.

Dr. Gillick also noted in his October 31, 2005 report, "[Claimant] says that for the most part he has had soreness of his thumbs and intermittent numbness and tingling in his hands for many years. It was always in the background for years when he would work hard. He always was able to work very hard and was proud of how powerful his hands were and how much and how fast he could do things. He never let it interfere with any work. He didn't seem actively conscious of it in the workplace, but he didn't seem to notice it too much until eight or ten months prior to his heart attack in March of 2002. He says that even though his hands would hurt some, he was so busy that he did not really notice anything. He says that there was a job to do; and he would just do the job and not worry about the hands or his arms or anything else." CX 12 at 420.

Dr. Gillick testified that he was asked to do an occupational history in reference to Claimant's hand symptoms, and that he "briefly looked at [Claimant's] hands" for about three minutes but "did not do a thorough examination at that time" because he was not asked to do so. Tr at 473-76. Dr. Gillick testified that "[a] physical examination would not have helped on causation for the hands and the arms . . . . The multiple different findings, the history through the years, the nature of the injuries to both hands, that's where you get causation. An examination doesn't give you causation, [it] tells you where you are today." Tr at 544. He also did not review x-rays at that time. Tr at 477. Dr. Gillick testified that he reviewed many medical records and depositions but did not note them in his report because he was not doing a medical history. Tr at 477-84, 499.

Dr. Gillick opined that Claimant's work over the entirety of his career contributed to the development of his upper extremity conditions and his ultimate disability. Tr at 441-42. Specifically, Dr. Gillick testified that Claimant's work for Keller was "a contributor" to his carpal tunnel and his left thumb problems. Tr at 530. Dr. Gillick stated that studies show that carpal tunnel causation depends on a combination of factors, including the frequency of exposure, number of years, repetition, force, posture, vibration, and breaks between exposures. Tr at 441-43, 539-40. He opined that Claimant's work involved an "immensely greater" than average exposure to these causal factors, even compared to other "hard-hat workers." Tr at 441.

Dr. Gillick testified that the fact that Claimant's hand problems are different and worse on the left could be explained by the use of certain tools, including holding the walkie-talkie in the right hand while working with the left, pushing on a jackhammer with left hand while triggering with the right, and holding the eight-ton shackle with the left hand while twisting it with the right. Tr at 462-66.

Dr. Gillick opined that Claimant's conditions developed over many years from his work, rather than over the short term due to an acute cause. Tr at 443-45. Dr. Gillick testified that, unless it is disease-related, carpal tunnel develops over many years of work, not a short time. Tr at 443. Dr. Gillick testified that testing has ruled out the other non-work-related causes, such as diabetes and luphacerrasemitosis, such that underlying arthritis and/or tendonitis and repetitive trauma are the only remaining causes. Tr at 443-44. Dr. Gillick testified that, based on his experience and training, Claimant "fits the [pattern of] cumulative trauma to the hands and forearms." Tr at 445. Dr. Gillick testified that Claimant's NCV studies from summer 2002 were "much more consistent with a long, insidious process" than a short process or sudden onset. Tr at 451. Dr. Gillick also testified that if there is a short onset of carpal tunnel and it is operated on within a year of onset, the nerves will recover quickly after surgery; but in Claimant's case "the EMGs show permanent damage in the nerves, continuing, ongoing damages." Tr at 452-53. Dr. Gillick also testified that the evidence of synovial thickening around Claimant's tendons "shows it's been long, long, long, long, long-term." Tr at 454-55.

With regard to the timing of symptoms, Dr. Gillick testified, "These things usually occur over multiple, multiple years. You're talking seven, ten, fifteen years, often more. People will have symptoms way before they complain about them, way before they even allow themselves to notice. They're dropping things, they suddenly say 'ouch.' People suck up lots of pain,

everyone in this room is sucking up pain. And most of the time you try to ignore it, and most of the time we're pretty successful. Carpal tunnel is often – and arthritis of the hands – is usually fairly far along before one notices it. It's not what a surgeon is going to see." Tr at 445. Dr. Gillick testified that his time period of seven to ten to fifteen years was supported by medical literature to which he cited. Tr at 539.

Dr. Gillick noted that there were complaints and chart notes about hand problems on May 5, 1995; October 21, 1999; February 8, 2001; and April 11, 2002. Tr at 450, 504-08, 510-18. With regard to the October 21, 1999 chart note regarding "arthritis over both hands, Dr. Gillick opined that having arthritis in both hands at that age would be "[u]ncommon, unless he was doing heavy work or something that would keep it active and aggravate it. There's a certain amount of arthritis you can see underlying in lots of people, and it certainly does occur. But for someone who is having a heart attack to complain about arthritis in his hands, that . . . paints a little different story." Tr at 512-19. Dr. Gillick opined that Claimant's arthritis in his hands must have been bothering him badly and have been "high on his perception table" for him to complain about it, because Claimant has other long-standing problems like ulnar nerve palsy and shoulder problems that he did not complain about. Tr at 519-21.

Dr. Gillick testified that he would not defer to the opinions of orthopedic surgeons in this case on the issue of causation because they do not have a background in epidemiology or occupational medicine and do not focus on issues of causation or long-term treatment. Tr at 427-29, 447. Dr. Gillick testified that he also read Dr. London's deposition transcript. Tr at 496-97. Dr. Gillick testified that he was struck by the impression that Dr. London "wasn't aware of the previous symptoms that had come up, and perhaps wasn't aware of the type of things this kind of employee would do." Tr at 497. Dr. Gillick disagreed with the opinion of Dr. London that Claimant's carpal tunnel was not work related because he did not have any symptoms while working. Tr at 445-46. Dr. Gillick noted that Claimant did complain of hand problems in 1995, and also stated, "Because somebody doesn't complain about something doesn't mean they don't have it. If I'm in for a heart attack, I'm not going to complain about my back or my shoulders." Tr at 446. He also added that physicians have a low tolerance for complaints unrelated to the condition they are focusing on. Tr at 446. Dr. Gillick also disagreed with Dr. Ohayon's opinion that work-related causation should be limited to the last 12 months of work, because that opinion is not supported by the medical literature and she does not focus on causation as a surgeon. Tr at 446-47. Dr. Gillick also reviewed the deposition transcript of Dr. Farran. Tr at 498. Dr. Gillick disagreed with the opinion of Dr. Farran that the predominant number of carpal tunnel patients seek treatment within a two to four-year period of their exposures. Tr at 448. Dr. Gillick testified that Dr. Farran's opinion was contradicted by the medical literature and Dr. Farran does not focus on causation or epidemiology as a neurologist. Tr at 448-49.

Dr. Gillick testified that Dr. Subin has a reputation for being an excellent, well-respected hand surgeon. Tr at 455, 477. Dr. Gillick testified that he reviewed Dr. Subin's deposition transcript. Tr at 481-87. Dr. Gillick found it surprising that Dr. Subin said he was "speculating" about causation, and Dr. Gillick noted that Dr. Subin did not specify what likelihood or probability he placed on his speculation. Tr at 496.

In response to the other physicians' testimony about alcohol as a cause of carpal tunnel, Dr. Gillick testified that alcohol "is not a significant factor in carpal tunnel" and that carpal tunnel "doesn't seem to come or go with alcohol abuse specifically." Tr at 506-07. He testified that he would "be neutral" on whether there was a correlation between alcohol abuse and carpal tunnel, and would "have to see some data on it." Tr at 506-07. Dr. Gillick testified that he did not see a connection between Claimant's complaint of "stiff hands" and his description of drinking 15 beers in the May 5, 1995 chart notes. Tr at 509. He testified that carpal tunnel is "a disease that has multiple contributing factors, alcohol may be one, but it certainly doesn't show up on any of the literature I'm familiar with." Tr at 542. He testified that even if alcohol is "a potential contributing factor . . . it potentially could make him more susceptible." Tr at 543.

Dr. Harrison

Dr. Robert Harrison testified on Claimant's behalf as an expert in occupational medicine. Tr at 1158-59; CX 14. He is board certified in internal medicine and occupational medicine. Tr at 1160. Dr. Harrison testified that he interviewed and examined Claimant, reviewed his medical records, and reviewed the depositions of the other physicians. Tr at 1163. Dr. Harrison specializes in two areas of occupational medicine, one of which is repetitive or cumulative trauma disorders, which accounts for about 75 percent of his practice. Tr at 1227. He has diagnosed and treated "hundreds of patients with work-related carpal tunnel." Tr at 1188, 1227.

Dr. Harrison opined, "[Claimant] has cumulative injuries to his upper extremities as a result of his employment as a marine worker, dating from 1975 to the time he was first diagnosed with these injuries in 2002. These injuries are cumulative, that is, they occurred slowly over the course of time, causing tissue injury, finally the development of symptoms, and the objective tests that were done to diagnose those conditions." Tr at 1164. Dr. Harrison testified that all of Claimant's work contributed to his conditions because he had the same risk factors and exposures. Tr at 1177, 1195-99, 1217, 1221-22. However, Dr. Harrison testified that he was unable to apportion the contribution among different jobs or different years. Tr at 1199, 1235.

Dr. Harrison testified that Claimant has three cumulative injuries to his upper extremities: bilateral carpal tunnel syndrome, arthritis at the base of his left thumb, and left ulnar nerve entrapment. Tr at 1164. Dr. Harrison testified, "There are three risk factors that led to these three medical conditions. Each of them alone could have caused his problems, but three together were at least additive and probably synergistic." Tr at 1164-65. Dr. Harrison described the three risk factors as repetition; placing the lower forearm, wrist, and hand in an awkward posture; and excessive force, in particular excessive gripping. Tr at 1165. Dr. Harrison testified that another major risk factor is vibration. Tr at 1227-28. Dr. Harrison explained that there is a strong relationship between these risk factors and upper extremity diseases, and the more years of exposure to these risks, the greater the risk of developing the disease. Tr at 1165-67, 1230-32. However, Dr. Harrison conceded that further study is needed to determine why not all workers who are exposed to such risks develop carpal tunnel. Tr at 1230-31. Dr. Harrison testified that these risk factors are the same for carpal tunnel as for arthritis. Tr at 1251-52. Dr. Harrison also explained how exposure to these risks causes micro-trauma and inflammation that the body can recover from early on, but "if you do that over a period of 15 or 20 years, . . . there's scarring and there's permanent injury." Tr at 1170. Dr. Harrison characterized Claimant's work schedule of

working 60 days 12 hours per day, then 30 days off as "intermittently highly repetitive" such that he has "highly significant exposure without . . . adequate recovery." Tr at 1170-71.

Dr. Harrison opined that he would expect a person in Claimant's position with his type of job to start having symptoms of carpal tunnel "after 15 or 20 years of work." Tr at 1189. Dr. Harrison opined that "his first exposure to the hazardous work occurred probably in the early 1980s and continued up until the time he was diagnosed and eventually stopped work in 2002." Tr at 1190, 1217. Dr. Harrison testified about the latency period between when Claimant was first exposed and when he was eventually diagnosed with carpal tunnel in June 2002. Tr at 1211-14, 1217.

Like Dr. Gillick, Dr. Harrison noted that Claimant had hand symptoms and diagnoses prior to 2002, including on May 15, 1995; October 21, 1999; and February 8, 2001. Tr at 1191-95, 1239-41. Dr. Harrison conceded that these earlier complaints did not involve "numbness and tingling" or diagnoses of carpal tunnel. Tr at 1192, 1994, 1244, 1247-48, 1254. However, Dr. Harrison stated, "there's at least some evidence that he was having some hand problems. And that's pretty typical of a person who develops carpal tunnel syndrome – is that early on there's some pain or aching or stiffness. The person doesn't necessarily say to the doctor, 'I have numbness and tingling.'" Tr at 1195. Dr. Harrison testified, "The symptoms that [Claimant] had, beginning in 1995, are symptoms that either are typical for osteoarthritis of the hands or carpal tunnel syndrome. They fall into general hand pain, hand discomfort, and the typical patient, the typical individual doesn't know what the problem is. They just know that their hands hurt." Tr at 1253. He elaborated, "Those are some of the earliest symptoms. They're a marker. Over the next several years, by the time he gets to 2002, seven years after 1995, it finally becomes severe enough and the diagnosis is made." Tr at 1255. Dr. Harrison testified that "this is a very common, typical, expected clinical course of someone who develops eventually severe carpal tunnel syndrome, [and] eventually develops numbness and tingling of the hands." Tr at 1195; *see also* Tr at 1241. He explained, "Because it's an insidious, slowly developing condition, I place no significance on Dr. Meyer's report in May of 2002 that [Claimant] complained of numbness and tingling at that point in time, and it happened to be after he was no longer working." Tr at 1195; *see also* 1245.

Like Dr. Gillick, Dr. Harrison opined that the results of Claimant's objective tests support a finding that his upper extremity conditions developed over a long period. Tr at 1174-77. The fact that the July 2002 nerve conduction velocity ("NCV") studies showed severe CTS indicates the damage occurred over a long period because it takes many years to get to that point. Tr at 1174, 1182, 1229-30. Similarly, the operative findings of synovial thickening were significant because "it's many, many years to build that up." Tr at 1174-75. The 2004 NCV studies still showed some damage to the left median nerve and incomplete recovery after surgery, which indicated that Claimant had been exposed for years. Tr at 1175-76, 1182-83, 1187. Dr. Harrison explained, "The literature shows that the more severe the carpal tunnel, the longer the person has had exposure to those risk factors. So if you have severe carpal tunnel, and I diagnose you today, I can tell you that you've had exposure to those risk factors for many, many years . . . . And, for whatever reasons, you're now in my office finally getting the tests and finally telling me that you've got pain and numbness in your hands." Tr at 1187-88. With regard to Claimant's arthritis, "[t]he x-rays support a slow, insidious, long-standing process. There's degeneration

that's seen on the bones in the x-rays of the hands. That's a process that occurs over many years." Tr at 1176. With regard to Claimant's ulnar nerve problems, Dr. Harrison opined that the testing again suggests "a long-standing problem." Tr at 1176-77.

Dr. Harrison testified that he did not see any evidence that Claimant had other "co-morbidity" or possible causes of his upper extremity problems than his work. Tr at 1177. Dr. Harrison testified that other non-industrial causes or risk factors include diabetes, thyroid, gout, wrist fracture, nerve damage, obesity, pregnancy, and hobbies that involve use of one's hands. Tr at 1228-29. Dr. Harrison testified that "Alcohol causes a peripheral neuropathy or damage to the long nerves. But that's different, that's the generalized damage to the long nerve. Carpal tunnel is just specific to the median nerve." Tr at 1228. Dr. Harrison testified, "[Claimant] doesn't have day-to-day activities that contribute to his carpal tunnel syndrome. What I'm specifically referring to is forceful grip, repetitive, highly awkward postures." Tr at 1215-16.

Dr. Harrison agreed that Claimant's numbness and tingling symptoms started after his March 2002 heart attack, and he testified that he had seen other patients who had more serious symptoms of carpal tunnel syndrome after heart attacks, but he emphasized "I want to be clear that there's no connection between [Claimant's] cardiac condition and his carpal tunnel syndrome." Tr at 1222-23. He testified that the heart attack is "a red herring," "irrelevant" and "coincidental." Tr at 1124. He conceded that numbness and tingling "can be caused by lack of oxygen to the heart, and then there can be a pain and a sensation that goes down into the left arm, and it can have a little bit of numbness and tingling in the fingertips. It's possible." Tr at 1224.

Dr. Harrison stated that he would not defer to Dr. Subin on issues of causation, even though he only saw Claimant once, because "I examined [Claimant], I reviewed his medical records, the deposition, the testimony. I've reviewed the medical and scientific literature. I have 20 years of clinical experience. I'm board-certified in occupational medicine. I've rendered many opinions on causation in cases like this. I feel like I'm as qualified to render an opinion on causation as Dr. Subin." Tr at 1205.

Dr. Harrison opined that Dr. London's opinion "contradicts the vast majority of the medical and scientific evidence . . . because it assumes that these disorders are acute, or of immediate onset, rather than cumulative or slow or building up over a period of years." Tr at 1169. Dr. Harrison opined that Dr. London's "opinion rests on the notion that [Claimant's] primary . . . ergonomic exposures occurred in the weeks or months around the spring of 2002, rather than built up slowly over a period of many years before finally reaching the point in which he became symptomatic enough to bring it to the doctor's attention and to go through a series of medical tests." Tr at 1169.

Similarly, Dr. Harrison opined that Dr. Ohayon's opinion also contradicts the scientific studies and Dr. Harrison's own experience, which show carpal tunnel increasing over years of exposure. Tr at 1173. Dr. Harrison stated that he would not defer to Dr. Ohayon's opinions, despite the fact that she is a hand surgeon, because "I've probably seen more cases of work-related carpal tunnel syndrome and upper extremity disorders than many orthopedic surgeons and hand specialists have." Tr at 1210.

Dr. London

Dr. London testified at the hearing on behalf of Global as an expert in orthopedic surgery. Tr at 670, 675; GX 22 at 536-41. Global also submitted Dr. London's deposition transcript. GX 25. He has been retained as an expert four to six times a month for the last 30 years, and has been called to testify about sixty or seventy times. Tr at 673-74. He has worked for claimants and employers, but conceded that he is most frequently retained by employers. Tr at 674, 714-15. Dr. London testified that he has done five or six carpal tunnel surgeries per month for the last 30 years, and he has treated two or three times as many patients for carpal tunnel. Tr at 728.

Dr. London first examined Claimant on April 19, 2004 and issued a report on April 24, 2004. Tr at 675-76; GX 4 at 10. He noted that Claimant's "job required the frequent use of his hands, going up and down stairs, holding on to ladders and lines frequently. He used his hands for gripping, pushing, pulling, lifting and carrying." GX 4 at 11. Dr. London noted, "[Claimant] states that he never had numbness, tingling, weakness or pain in his upper extremities until a few months prior to the 3/28/02 heart attack." GX 4 at 12. He also noted, "[Claimant] is alleging that he had numbness and weakness in his hands for two to three months prior to the 3/28/02 incident. He indicates that he did not report this to his employer. His medical records, in fact, indicate that when he was evaluated by Dr. David Meyer he was released to work on 5/15/02, [Claimant] then claimed that he developed fatigue, headaches and numbness in his hands." GX 4 at 14; GX 4 at 19. Dr. London opined that "if [Claimant] had carpal tunnel syndrome as a result of his work activities he would have had symptoms in the course of his work . . . [and] reported his symptoms during the course of his work and sought medical treatment during this employment, and not several months after he sustained a myocardial infarction. The symptoms he complained of after the myocardial infarction are consistent with a cardiac condition and not carpal tunnel syndrome until he was returned to work in 5/02. In my opinion, his carpal tunnel syndrome is not related to his work or his work activities." GX 4 at 14.

In his February 9, 2005 report, Dr. London noted, "While ulnar tunnel and carpal tunnel syndrome can develop or be aggravated as a result of one's work activities, it is my opinion that if [Claimant] had carpal tunnel or ulnar tunnel syndromes as a result of his work activities he would have had the symptoms in the course of his work. In my opinion, the absence of symptoms while he was performing strenuous work with his hands indicates that these conditions were not related to his work." GX 4 at 19. Dr. London also stated, "In my opinion, the bilateral carpal tunnel syndrome, the left ulnar tunnel syndrome and the carpometacarpal joint of his left thumb were not aggravated by, worsened by or accelerated by his work activities at Global Offshore International." GX 4 at 19.

In his May 13, 2006 report, Dr. London noted, "[Claimant] is alleging that he had numbness and weakness in his hands for two to three months prior to the 3/28/02 incident. It continues to be my opinion that while ulnar tunnel and carpal tunnel syndrome can develop or be aggravated as a result of one's work activities, if [Claimant] had carpal tunnel or ulnar tunnel syndromes as a result of his work activities he would have had the symptoms in the course of his work. In my opinion, the absence of symptoms while he was performing strenuous work with his hands indicates that these conditions were not related to his work. I would agree with Dr. Ohayon that these conditions are not related to [Claimant's] work." GX 31 at 1234-35. Dr.

London also stated, "I agree with Dr. Ohayon that [Claimant] has undergone appropriate treatment and that the bilateral carpal tunnel syndrome, the left ulnar tunnel syndrome and the carpometacarpal joint of his left thumb were not aggravated by, worsened by or accelerated by his work activities at Global Offshore International." GX 31 at 1235.

At the hearing, Dr. London again opined that Claimant's carpal tunnel syndrome was not related to his employment with Global or Keller. Tr at 682, 687, 693-94, 702-03, 727. He reasoned, "In reviewing his medical records, I saw that . . . he related the onset of his symptoms at different points in time, to start at times as far back as 2001, a few months before 3/28/02, when he had the heart problem, eight months before 3/28/02. So I relied, therefore, on the medical records. The medical records reflect that he didn't have the carpal tunnel-type symptoms until, I think it was, after he was released to return to work in late June of 2002." Tr at 682. Dr. London testified, "I would have expected him to have symptoms on and off for a long time, prior to March of 2002, if the carpal tunnel syndrome was coming from his work. In other words, nerves are very sensitive; they're the things in our bodies that pick up abnormal sensations. And so when the nerve itself is injured or damaged, it doesn't take an individual very long to figure out there's problem . . . . So, if there's a pressure on the ulnar nerve from certain things that you're doing, the individual tends to have symptoms right then." Tr at 686-87.

Dr. London also opined that Claimant's left thumb arthritis was not aggravated, worsened, or caused by his employment. Tr at 693-94, 702-03. Dr. London reasoned, "The onset of his symptoms was considerably delayed after he stopped working. The degree of the arthritis, which was mild [and] subsequently, he, years later, developed similar symptoms in the other hand, even further removed from this employment." Tr at 694.

Dr. London opined that none of Claimant's bilateral carpal tunnel, arthritis, or ulnar entrapment conditions were caused or aggravated by his work. Tr at 712.

Dr. London noted that carpal tunnel can be cause by "Diabetes, inflammatory diseases such as rheumatoid arthritis, alcoholism, vitamin deficiencies, thyroid disease, double crush syndrome, where you have problems further up the line in the nerves, masses in and around the carpal tunnel that crowd the nerve." Tr at 713. However, Dr. London conceded that he has not articulated a probable cause of Claimant's carpal tunnel. Tr at 713.

Dr. London questioned Claimant's candor on the grounds that "there were some findings on exam with his grip, at least on one occasion" that bothered him, and there was some variation in Claimant's history about whether his hand symptoms started "two months, eight months, or a year before" his March 2002 heart attack. Tr at 692. However, Dr. London agreed that this could be explained by the fact that Claimant is "poor on dates" and "all the dates just seem to blend together" for him. Tr at 692. Dr. London conceded that there was nothing else in this case that would suggest that Claimant has been less than forthright and truthful. Tr at 711.

Dr. London testified that Dr. Farran has a "very good reputation" and he agreed with Dr. Farran's opinions in this case. Tr at 704. Dr. London testified that he refers patients to Dr. Farran. Tr at 726. However, referring to Dr. Gillick, Dr. London testified that it would be "below the standard of care in the community" not to conduct an examination before articulating

medical opinions. Tr at 678-79. However, Dr. London conceded that Dr. Gillick's conclusions likely would not have been any different if he had conducted an examination. Tr at 719.

Dr. Farran

Dr. Farran testified on Global's behalf as an expert specializing in the field of neurology. Tr at 738; GX 22 at 542-44. Global also submitted Dr. Farran's deposition transcript. GX 23. He is board-certified in neurology and pain management. Tr at 738, 770. Dr. Farran testified that he reviewed all of the records he received, but conceded that he may not have received all of Claimant's medical records. Tr at 766-68, 779. Dr. Farran testified, "I've seen carpal tunnel cases every day for the last 30 years, and I'm quite familiar and comfortable in dealing with that, and the causes, treatment and prognosis." Tr at 776. He conceded that his work does not focus on issues of causation, but he keeps up on such issues by reading medical literature. Tr at 776.

In his April 19, 2004 report, Dr. Farran noted that Claimant complained of "Aching pains and shooting pains that involved the hands, wrists and arms. He states that this developed prior to his cardiac symptoms in early-2002. These symptoms would awaken him at night and worsened after his cardiac treatment." GX 5 at 23. Dr. Farran also noted, "[Claimant] denies having other repetitive activity-type hobbies or jobs other than for the years that he worked at [Global]." GX 5 at 24. Dr. Farran complained that he did not have access to all of Claimant's medical records in creating his April 19, 2004 report and thus could not opine on other injuries or other possible causes of Claimant's conditions. GX 5 at 28-29. Dr. Farran opined, "It is difficult to ascertain the time of onset of [Claimant's] carpal tunnel symptoms since it is a condition that generally develops gradually due to repetitive activities. Often times, there is not a specific incident that has led to the entrapment neuropathy. On the other hand, it is my opinion that the symptoms of carpal tunnel syndrome would have developed much sooner if it was attributed to his work with [Global]. More than likely, entrapment occurred for other reasons following his brachytherapy." GX 5 at 29. Dr. Farran also opined, "Although the records are not available to review regarding the progression of his carpal tunnel symptoms, his condition apparently progressed unrelated to any employment factors with [Global], finally requiring carpal tunnel release surgery later that year, in September and October of 2002. It is my opinion, then, that his employment with [Global] was not responsible for the development or worsening of his carpal tunnel syndrome." GX 4 at 29. Dr. Farran also notes, "It is interesting that my clinical exam revealed the presence of a left ulnar entrapment, which appears to be chronic and probably dates back many years, to the time of his elbow surgery in the 1990's . . . . However, once again, there were no medical records of that treatment to review." GX 5 at 29.

In his February 3, 2005 report, Dr. Farran opined, "After a repeat interview and neurological examination of [Claimant], on February 2, 2005, as well as a review of additional medical records, the opinions that I expressed in the April 19, 2004 [report] remain unchanged. I am still unable to conclude that [Claimant] had sustained any injury attributable to his employment with Global Offshore International that would account for his carpal tunnel syndrome. Although [Claimant] claims that he developed symptoms of carpal tunnel prior to March 28, 2002, he did not report such symptoms until these were brought to the attention of Dr. David Meyer . . . . I agree with Dr. London that had [Claimant] developed carpal tunnel syndrome as a result of his work activities, he would have reported his symptoms and sought

medical treatment during this employment, rather than several months after sustaining a myocardial infarction on March 28, 2002. The symptoms experienced after his myocardial infarction are consistent with that cardiac condition. The symptoms of carpal tunnel syndrome did not develop until he was released to work in May 2002. Therefore, it appears that his carpal tunnel syndrome is not related to his work or work activities." GX 5 at 44.

Dr. Farran also opined in his February 3, 2005 report, "Following the carpal tunnel release surgeries later that year, [Claimant] had full recovery of median nerve function . . . . On the other hand, [Claimant] continues to have numbness and paresthesias in the ulnar distribution of the left hand. He also continues to have evidence for weakness in the ulnar innervated muscles. An ulnar entrapment neuropathy is confirmed, not only by examination, but by the results of both my EMG/NCV study and the study performed by Dr. Reidler. Both studies are consistent with acute and chronic changes to the ulnar nerve, localized to the ulnar groove at the elbow. As I stated in my initial report, injury to the ulnar nerve most likely occurred at the time of his elbow injury, while employed by OPI in the early 1990s. This would, therefore, be considered a 'tardy ulnar palsy.' There is no evidence that he injured his left ulnar nerve while under the employ of Global." GX 5 at 45. He added, "[Claimant] also has problems with the nonindustrial-based degenerative arthritis of the left thumb, which was recently operated on. Again, this is a condition . . . due to degenerative arthritis and not due to any injury he sustained at Global." GX 5 at 45. Dr. Farran concluded, "Any disability he has at this time is based on the natural progression of his underlying cardiovascular condition and other nonindustrial injuries such as arthritis of his thumbs, hypertension, dyslipidemia, and his ulnar neuropathy." GX 5 at 45.

At the hearing, Dr. Farran concluded that Claimant's carpal tunnel syndrome is not work related because he never had any symptoms during his employment and his symptoms did not start until months after he stopped working. Tr at 752, 762-63. Dr. Farran conceded that Claimant told him he was having hand problems toward the end of his employment with Global, but he testified, "I think the medical records are more important than what he's trying to tell me." Tr at 778. Dr. Farran interpreted Dr. Meyer's June 28, 2002 letter as indicating that Claimant's hand symptoms started after May 15, 2002. Tr at 753-54.

Dr. Farran testified that although one would intuitively think that carpal tunnel syndrome arises from repetitive work exposures, "there are a number of articles that don't support that in actuality." Tr at 772-75. He stated that "the controversy is that there are other factors involved that lead to carpal tunnel other than occupational findings." Tr at 773. Dr. Farran testified that there can be non-medical situations and causes that may cause a patient to become aware of and report carpal tunnel symptoms, including "job dissatisfaction, low pay, or problems with personnel." Tr at 773. Dr. Farran agreed that there was no evidence of an acute cause of Claimant's carpal tunnel. Tr at 786. Dr. Farran agreed that there was no evidence to support a conclusion that Claimant's carpal tunnel was caused by another medical condition such as diabetes, thyroid disease, fracture, vascular insults, or other metabolic problems. Tr at 774.

Dr. Farran opined that Claimant's heart treatment may have precipitated or aggravated his ulnar tunnel condition. Tr at 786. He opined that Claimant's ulnar tunnel condition dates back to his prior left arm injury. Tr at 786. Dr. Farran stated that the most common cause of

ulnar entrapment is "leaning on the elbow inadvertently." Tr at 786. He testified that there is a controversy about the role of repetitive work in causing ulnar entrapments. Tr at 786-87.

Dr. Farran testified that the first nerve study, without EMG, in July 2002 showed carpal tunnel syndrome. Tr at 784-85. However, he testified that "The nerve conduction time study, you cannot really determine an exact time of onset. If the EMG had been abnormal, if it started to show abnormalities, you know that it's been there at least two weeks. As far as the nerve conduction time study, that could be acute, or it could be chronic. There's no way to determine whether or not the delay is old or new." Tr at 786.

Dr. Farran also testified about the April 19, 2004 NCV/EMG testing. Tr at 748-50. He testified that, with regard to the ulnar nerve, the "findings were consistent with both chronic and ongoing damage in that nerve, at the elbow." Tr at 750. He also testified that, with regard to the median nerve, "there was no evidence of damage to the core of the nerve, based on a negative EMG. The reduced amplitudes of sensory potentials could indicate some axonal involvement. The main finding was the delay of the motor and sensory latencies across the carpal tunnel, and . . . of course, even after surgery, one still continues to see those kinds of changes . . . . It's uncommon to see it return all the way back to normal." Tr at 750.

Dr. Farran testified that he examined Claimant. Tr at 739, 746, 758. When asked about Dr. Gillick not having examined Claimant, Dr. Farran testified that "an examination is a crucial part, and that he should have performed an exam to be able to make any conclusions." Tr at 764. He added that an examination is important because "as they say in medical school, the history tells you what it is and the exam tells you where it is." Tr at 793. He conceded that an examination would not be necessary to make or confirm Claimant's diagnoses, since they are not in dispute. Tr at 788-89. Dr. Farran testified that Dr. Gillick's report was unusual in that it did not include an exam or a medical record history. Tr at 793-94. However, Dr. Farran conceded that Dr. Gillick's report stated that he reviewed extensive medical records and that the report was intended to be an occupational history. Tr at 794-96.

Dr. Farran testified that although he found some "giveaway weakness" on one of his exams, which could be a sign of a patient not cooperating fully, he found Claimant to be cooperative and straightforward and would have documented if he believed Claimant was feigning part of the exam. Tr at 790.

Dr. Ohayon

Dr. Ohayon testified on behalf of Keller as an expert in hand surgery. Tr at 1262, 1268; KX 4 at 27-28. Keller and Global also submitted copies of Dr. Ohayon's deposition transcript. KX 12; GX 28. She is self-employed as a hand surgeon, practicing exclusively in hand and wrist surgery. Tr at 1263, 1265. Dr. Ohayon performs hand surgeries almost every day. Tr at 1282.

Dr. Ohayon issued a February 2, 2006 report. KX 4. Dr. Ohayon opined, "From his own report as well as all of his medical records, the earliest [Claimant] described having symptoms were several months prior to his myocardial infarction in March of 2002, five years after he left employment with [Keller]. Even though compressive neuropathies are often the result of

cumulative trauma, twelve months would seem to be a reasonable cutoff for a causal relationship to occur. Therefore it is my opinion that [Claimant's] carpal tunnel syndrome is not the result of his work activities for [Keller]." KX 4 at 25.

Dr. Ohayon issued a May 3, 2006 report in which she opined on causation related to Claimant's work for Keller. KX 4 at 14-15. She opined, "In his deposition, [Claimant] reports that he did not sustain any injury while working for [Keller], and his symptoms of bilateral carpal tunnel syndrome did not arise until over five years later in 2002. It is still my opinion that [Claimant's] carpal tunnel syndrome is not the result of work activities for [Keller]." KX 4 at 15. Dr. Ohayon also opined that Claimant's basilar joint arthritis and scaphotrapezial arthritis were not work related because there was no record of any pain, symptoms or tenderness until October 28, 2002. KX 4 at 15. With regard to Claimant's ulnar nerve entrapment, Dr. Ohayon opined that "given the results of the EMG nerve conduction studies, the irritation that I noted at Guyon's canal may be more related to a double-crush phenomenon, as the EMG nerve conduction studies that were performed in March of 2002, the ulnar nerve was normal bilaterally. This again lends support that the ulnar nerve symptoms are nonindustrial in nature." KX 4 at 15.

At the hearing, Dr. Ohayon opined that Claimant's work for Keller in 1996 and 1997 is not causally related to his carpal tunnel syndromes, his left ulnar nerve conditions, or his left thumb arthritis. Tr at 1299. Dr. Ohayon also opined that Claimant's work for Global in 1995 and 1996 is not causally related to his carpal tunnel complaints in 2002, his carpal tunnel surgeries in 2002, his left thumb surgery in December 2004, or his left ulnar nerve condition. Tr at 1300-01. Dr. Ohayon opined that Claimant's work for Global from 1998 through 2001 was not responsible for his carpal tunnel complaints, carpal tunnel surgeries, left thumb injury, left thumb surgery, or left ulnar nerve condition. Tr at 1302. However, she opined that his employment for Global through 2002 contributed to his carpal tunnel and ensuing surgeries because his "symptoms began three months before he left, which puts [causation] at around December of '01 or January of '02." Tr at 1301-03.

Dr. Ohayon opined that "from speaking with [Claimant] and in reviewing all the medical records, I believed [Claimant] when he told me that his symptoms started three months before he had his heart attack in March of 2002. So in terms of causation, I think that his carpal tunnel started at that point." Tr at 1272.

Dr. Ohayon testified about factors that contribute to carpal tunnel. Tr at 1273. She stated, "There are age-related factors, weight or BMI-related factors, hypothyroidism, and a number of medical conditions: diabetes, rheumatoid arthritis, that have all been found to be contributory. There's also . . . a fair number of people who have idiopathic carpal tunnel syndrome." Tr at 1273. She added, "Alcohol has been associated with lowering the threshold for the development of the syndrome in clinical tests. There also are some people who feel that there's a genetic or a family history component, that people who have family history of carpal tunnel are more likely to develop it." Tr at 1274. Dr. Ohayon agreed that none of these co-morbidities, or other medical conditions, applied to Claimant's case as causes of his carpal tunnel. Tr at 1313-14. Dr. Ohayon stated that carpal tunnel syndrome is "extremely common. So what that tells you is that there's going to be a combination of factors related to the patients themselves that will predispose them to carpal tunnel." Tr at 1274. Dr. Ohayon discussed an

article in which "they did a regression analysis trying to find causation, [and found] that 85 percent of the reasons could be explained by medical, patient-related factors, and eight percent could be linked industrially." Tr at 1274-75. Dr. Ohayon cited another study that found that the single most important factor for predicting who was going to develop carpal tunnel was whether the patient had abnormal nerve conduction studies to begin with and the second most important factor was BMI, and "way down the list were the industrial factors." Tr at 1297. Dr. Ohayon agreed that the medical records show Claimant's weight increased from 165 pounds on May 5, 1995, to 193 pounds on February 8, 2001, to 201 pounds on June 26, 2002. Tr at 1276-77.

With regard to Claimant's arthritis condition, Dr. Ohayon testified that she was not aware of Claimant having arthritis complaints dating back to 1996 and 1997. Tr at 1286-87. Dr. Ohayon testified that Claimant's "arthritis situation is complex. He has two separate problems on his left side and one problem on his right." Tr at 1287. She opined that Claimant's left thumb arthritis is not industrial in nature. Tr at 1287. Dr. Ohayon also stated, "There's not a correlation between patients who have carpal tunnel developing arthritis." Tr at 1286.

With regard to Claimant's ulnar nerve conditions, Dr. Ohayon noted, "in the initial EMG nerve conduction study that was done by Randall Hawkins in 2002, the ulnar nerve was normal. In his later EMGs that were done in 2004 and 2005, there is compression at the level of the elbow, by nerve conduction studies. So those, the ulnar nerve problems occurred well after he stopped working for [Keller] and Global." Tr at 1285. She opined that it "would be medically most reasonable and probable" to conclude that something happened between the 2002 and 2004 nerve studies. Tr at 1285. Consequently, she opined that Claimant's ulnar nerve condition is not industrially related. Tr at 1286.

Dr. Ohayon performed a physical examination of Claimant. Tr at 1268. She testified that "it is the standard of care to do a full examination of the related areas" if a physician is doing an evaluation or providing an opinion. Tr at 1269. Dr. Ohayon testified that Dr. London and Dr. Farran's opinions are reasonable, but she disagrees with them. Tr at 1271, 1304. She also disagrees with the opinions of Dr. Gillick and Dr. Harrison that causation occurred over a long time, "unless there's documented evidence along the way." Tr at 1271. She explained that based on the records she had reviewed, "I think that going back to 1975 for someone who has symptoms that didn't appear until 2002, or at the very earliest the end of 2001, is unreasonable." Tr at 1272. She opined that the opinions of Dr. Harrison and Dr. Gillick were not reasonable in this case. Tr at 1299. Dr. Ohayon testified that Dr. Subin has "an excellent reputation." Tr at 1306. She testified that all of the medical care Dr. Subin gave Claimant was reasonable and necessary, including his left wrist/thumb surgery and his thumb splint. Tr at 1305-08.

Dr. Ohayon testified that Claimant was "very reliable" and she had not seen anything to suggest that he was other than honest and straightforward. Tr at 1321.

Analysis of Causation of Upper Extremity Conditions

As stated above, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy*, 7 BRBS 309, and working conditions existed or an accident occurred that could have caused the harm or

pain, *Kelaita*, 13 BRBS 326. The first prong of the section 20(a) presumption is satisfied because, as discussed above, there is no dispute that Claimant suffers from bilateral carpal syndrome, bilateral arthritis of the hands, and bilateral ulnar entrapments. Thus, I must consider the second prong, which focuses on whether Claimant has presented evidence that these conditions were work related.

Claimant presented his own testimony about the heavy work that he did with his hands throughout his employment. Claimant also presented the deposition testimony of Dr. Subin that Claimant's symptoms are attributable to cumulative trauma and all of his employment throughout the years would have contributed in some fashion to his ultimate and resulting disabilities. GX 26 at 1005. In addition, Claimant presented the report of Dr. Gillick stating that Claimant's carpal tunnel and arthritis "are recognized and widely accepted to be resultant from cumulative trauma over many years of abuse." CX 12 at 417. Claimant also presented Dr. Gillick's testimony that Claimant's work over the entirety of his career contributed to the development of his conditions and his ultimate disability, and that testing shows that his conditions developed over many years from his work, rather than over the short term due to an acute cause. Tr at 441-45. Lastly, Claimant presented the testimony of Dr. Harrison that Claimant's upper extremity conditions are caused by cumulative trauma from his employment, and that all of his work contributed to his conditions because he had the same risks factors in each job. Tr at 1164, 1177, 1195-99, 1217, 1221-22. I find that this evidence is sufficient to raise the section 20(a) presumption.

Next, the burden shifts to the employer to rebut the presumption by presenting substantial evidence that the injury was not caused by the claimant's employment. *Dower*, 14 BRBS 324.

Keller presented the February 2, 2006 report of Dr. Ohayon that Claimant did not have carpal tunnel symptoms until several months before March 2002, and twelve months before the symptoms was a reasonable cutoff for causation. KX 4 at 20. Keller also presented the May 3, 2006 report of Dr. Ohayon stating that Claimant's carpal tunnel was not related to his work for Keller because his symptoms did not arise until 2002, his arthritis was not work related because there was no record of symptoms until October 28, 2002, and his ulnar nerve entrapment was not work related because the EMG nerve conduction studies from March 2002 were normal and the irritation shown may be more related to a double-crush phenomenon. KX 4 at 15. Keller also presented the testimony of Dr. Ohayon that Claimant's carpal tunnel symptoms started around December 2001 or January 2002, which is the point of causation. Tr at 1272, 1301-02. Dr. Ohayon also opined that Claimant's ulnar nerve condition is not work related because his 2002 tests were normal and his 2004 and 2005 tests show compression. Tr at 1285-86. There were also the opinions of Dr. London that Claimant's upper extremity conditions were not work related because he did not have symptoms while his was working and symptoms did not arise until after he stopped working. GX 4 at 14; GX 4 at 19; GX 31 at 1234-35; Tr at 682-87; 693-94, 702-03, 727. There were also the opinions of Dr. Farran that Claimant's carpal tunnel was not work related because the symptoms did not develop until after he stopped working in 2002, his ulnar entrapment probably relates back to his elbow surgery in the 1990s and may have been aggravated by his heart condition, and his arthritis is degenerative and not work related. GX 5 at 29; GX 5 at 44-45; Tr at 752, 762-63, 786. I find that all of this evidence is sufficient to rebut the section 20(a) presumption.

Since the presumption has been rebutted, I must now weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop,* 14 BRBS 927.

First, I again note that a treating physician's opinion is usually entitled to "special weight" in weighing medical evidence concerning a worker's injury. *Amos,*153 F.3d 1051. Here, Dr. Subin has been Claimant's treating physician for his upper extremity conditions since Claimant first saw him on August 12, 2002. Tr at 361-62, 1020; CX 3 at 20-21, 211-12, 218-19. Furthermore, Dr. Subin's credibility as a treating physician is enhanced by his emphatic statements at his deposition that his "primary reasons for being involved with [Claimant] was to treat him" and the fact that he was reluctant to get involved with legal matters. GX 26 at 986. Dr. Subin is also an experienced orthopedic surgeon specializing in hand surgery, GX 26 at 964, and Dr. Gillick, and even Dr. Ohayon, agreed that he has an excellent reputation. Tr at 455, 477, 1306. Thus, Dr. Subin's opinions about causation are entitled to special weight.

Second, I note that the opinions of Employers' medical experts, Dr. London, Dr. Farran, and Dr. Ohayon, are based in large part on their beliefs that Claimant did not have any upper extremity symptoms until 2002. However, Dr. Gillick and Dr. Harrison correctly noted that Claimant did have documented symptoms, complaints, and diagnoses relating to his upper extremities prior to 2002. Tr at 450, 504-08, 510-18, 1191-96, 1239-41. Specifically, on May 5, 1995, Dr. Ralph Brown noted, "stiff hands with work." CX 3 at 240. On October 21, 1999, Dr. Stephen Gormican noted, "He has had some arthritis over both hands." CX 25 at 507. On February 8, 2001, Dr. Thomas Harless noted that Claimant had osteoarthritis of the hands. CX 3 at 234-35. In addition, Dr. Meyer emphasized, "My letter of June 28, 2002 should not necessarily be considered to establish the date of onset of these hand symptoms. I had known that [Claimant] had complaints about his hands dating back to when he was first seen by me in 1999." CX 32. I find that the fact that Employers' medical experts did not notice or discuss these prior symptoms, complaints, and diagnoses severely undermines their opinions about the causation of Claimant's upper extremity conditions.

I also note that on cross-examination, Employers questioned the relevance of these prior symptoms, complaints, and diagnoses, given that they did not clearly involve carpal tunnel symptoms or diagnosis. However, Dr. Harrison credibly responded that "The symptoms that [Claimant] had, beginning in 1995, are symptoms that either are typical for osteoarthritis of the hands or carpal tunnel syndrome. They fall into general hand pain, hand discomfort, and the typical patient, the typical individual doesn't know what the problem is. They just know that their hands hurt." Tr at 1253. Dr. Harrison emphasized that these early symptoms of stiffness, aching, and pain in the hands are typical and expected for someone who later develops numbness and tingling and is diagnosed with carpal tunnel. Tr at 1195, 1241. Similarly, Dr. Gillick found these earlier notes to be relevant. Tr at 450, 504-08, 510-18. He also credibly responded that the fact that Claimant was complaining of arthritis in 1995 and 1999, when he was relatively young and had more pressing health problems, indicates that his arthritis was work related and rather painful. Tr at 512-21. Thus, because I find Dr. Harrison and Dr. Gillick credible on this issue and because Employers' medical experts failed to address these earlier notes, I find that these prior symptoms, complaints, and diagnoses support the conclusion that Claimant's upper extremity conditions developed over time due to cumulative trauma from his work.

Third, even assuming *arguendo* that Claimant's earlier hand symptoms, complaints, and diagnoses were not related to his later-diagnosed conditions or assuming that he did not have any upper extremity symptoms at all until 2002, I would nevertheless find that his upper extremity conditions are work related. When asked about the delay in time to when Claimant's symptoms manifested themselves, Dr. Subin credibly testified, "It's possible just like many patients with carpal tunnel, the symptoms are very mild [but they are] there. They attribute it to fatigue, they attribute it to other things, and they ignore them. And sometimes they are there for a number of years before they become so manifested that it becomes a surgical necessity." GX 26 at 993. Similarly, Dr. Gillick testified that the fact that a patient does not complain about a condition does not mean he does not have it, because patients have conditions long before they notice them and they have symptoms long before they complain about them. Tr at 445-46. He testified specifically, "Carpal tunnel . . . and arthritis of the hands – is usually fairly far along before one notices it." Tr at 445. Dr. Harrison also testified that carpal tunnel has a long latency period, Tr at 1211-24, 1217, and the fact that Claimant did not have severe symptoms or a diagnosis of carpal tunnel until 2002 is consistent with causation over the long term due to his work. Tr at 1195, 1255. Based on this credible testimony, I find that Claimant's upper extremity conditions are work related even if his symptoms and diagnoses did not occur until 2002.

I also find that the evidence supports a conclusion that carpal tunnel develops over a long period of time, rather than with an acute or immediate onset. Dr. Gillick and Dr. Harrison testified that these conditions develop over many years. Tr at 443-45, 451-55. They also testified that Claimant's objective tests, including his 2002 and 2004 NCV studies, x-rays, and ulnar nerve tests, show a level of damage that is consistent with long-term causation. Tr at 451-55, 1174-77, 1182-83, 1187, 1229-30. Dr. Gillick and Dr. Harrison argued that the opinions of Employers' experts about short-term causation or acute onset should not be credited because they do not focus on issues of causation, and their opinions are not supported by the evidence or based in the medical literature. Tr at 427-29, 445-49, 496-97, 1169, 1173, 1210. In particular, Dr. Ohayon's opinion that causation for carpal tunnel is limited to the prior twelve months before symptoms or diagnosis is arbitrary and not supported by any facts related to Claimant's particular work, symptoms, or testing.[5] Tr at 446-47, 1173.

Fifth, Employers' medical experts identified other factors or potential causes of carpal tunnel, but they never opined that Claimant's carpal tunnel was caused by any specific factor. Tr at 713, 772-75, 1273-75. Dr. London conceded that he had not articulated a probable cause of Claimant's carpal tunnel. Tr at 713. Similarly, Dr. Farran agreed that there was not evidence to support a conclusion that Claimant's carpal tunnel was caused by another medical condition. Tr at 774. Dr. Ohayon also agreed that none of the other medical conditions she discussed as potential causes of carpal tunnel applied to Claimant. Tr at 1313-14. On the other hand, Claimant's medical experts testified that the testing and evidence did not show any non-work-related causes. Tr at 443-44, 1177. Dr. Harrison testified that neither alcohol nor ordinary daily activities could cause the type of damage Claimant suffered to his carpal tunnel. Tr at 1215-16, 1228. Dr. Gillick suggested that even if alcohol was a contributing cause, it would make Claimant more susceptible to injury from his work. Tr at 543.

[5] The evidence also suggests that Dr. Ohayon may have been relying on the California state worker's compensation standard for causation. Tr at 1171-73.

Sixth, Keller argues that Dr. Gillick's opinions should not be credited because he "was only hired to do an occupational history, not a medical history" and did not do a physical exam of Claimant's hands. ALJX 6 at 12, 13. Although they did not necessarily refer to him by name, Employers' medical experts all criticized Dr. Gillick for rendering opinions without conducting a full examination of Claimant's hands. Tr at 678-79, 764, 793-96, 1268-69. However, Dr. London conceded that Dr. Gillick's opinions would not have been any different if he had conducted an examination. Tr at 719. Dr. Farran also conceded that an exam was not necessary because Claimant's diagnoses are not in dispute, Dr. Gillick did do an extensive medical record review, and the purpose of Dr. Gillick's report was to do an occupational history. Tr at 788-89, 794-96. I note that Dr. Gillick did briefly look at Claimant's hands for about three minutes. Tr at 473-76. I find that this exam, combined with an interview of Claimant and a complete records review, was sufficient to render opinions given Dr. Gillick's extensive experience with occupational medicine, and carpal tunnel in particular. Tr at 411-34. I also note that Dr. Gillick's opinions were very similar to those of Dr. Harrison, who did examine Claimant. Tr at 1205. For these reasons, I find Dr. Gillick credible despite the fact that he did not conduct a full examination of Claimant's hands.

Based on all of the above, I find that Claimant has met his burden of proving that his upper extremity conditions are the result of cumulative trauma throughout his work.

B. Hearing Loss Causation

Legal Standard for Causation

An employer is liable for the claimant's entire hearing loss where the claimant's exposure to injurious noise levels during his employment with that employer caused his hearing loss or combined with his pre-existing hearing loss to cause a greater degree of disability. *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327 (4th Cir. 1982).

As stated above, to invoke the section 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he suffered some harm or pain, *Murphy*, 7 BRBS 309, and working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita*, 13 BRBS 326. Once the section 20(a) presumption is invoked, the burden shifts to the employer to present substantial evidence that the injury was not caused by the claimant's employment. *Dower*, 14 BRBS 324. If the presumption is rebutted, the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop*, 14 BRBS 927.

Claimant's Testimony Regarding Hearing Loss

Claimant testified that he was exposed to loud noise throughout his employment. Tr at 129. Claimant testified that he often used radios in his work, more in later years than in earlier years. Tr at 128. He testified that his habit and practice, every time he used a radio, was to wear a microphone pinned to his collar next to his right ear, and he would turn his left ear toward any

source of loud noise, including machinery or wind, in order to hear the radio and to protect the microphone so he would be understood clearly. Tr at 128-30, 160.

Claimant testified that, during his employment with Global in 1995-96 on the DB-1/*Navajo*, the work was "noisy" and sounded "like you had your head in a bucket." Tr at 158-59. Claimant did not wear hearing protection. Tr at 158-59. He also wore his radio and microphone during this job. Tr at 159.

Claimant testified that during his employment with Keller, he was exposed to loud noises and did not wear hearing protection, although it was provided. Tr at 345-46, 987. Claimant's testimony about his noise exposure at Keller was confirmed by the testimony of Mr. Muschong. Mr. Muschong testified that the machines on the platform generated noise. Tr at 615. He testified that all of the equipment on the platform was "whisperized" to reduce the noise so there was very little noise from running equipment, and that Keller provided ear plugs for employees who wanted them. Tr at 615-16. However, he conceded that the pile drivers were much louder. Tr at 616. He also testified that the workers would be exposed to noise from pneumatic air tools. Tr at 622-23.

Claimant also testified that he was exposed to noise when he was working in Louisiana on the *Iroquois* and the related barges during his second period of employment for Global. Tr at 232. He testified that he did not usually wear hearing protection during this time "because I have to hear my radio." Tr at 652. He used his radio and the microphone on his right side, consistent with his usual habit. Tr at 657-58.

Claimant testified about his head injury. Tr at 259-60, 347. However, he did not have hearing loss at the time of his head injury. Tr at 347.

Claimant testified that he was not exposed to loud noises very much in the Air Force because he was an ammunition specialist and worked "in the bomb dump, which is away from everything else . . . ." Tr at 119. Claimant testified that he was exposed to noise from planes taking off and landing on the flight line. Tr at 1001. However, Claimant testified that he would go to the flight line to deliver munitions only occasionally, as he usually worked in the bomb dump. Tr at 827-28.

Claimant testified that he asked the doctors who administered his audiograms why he had hearing loss in one ear but not the other, but they could not explain it to him. Tr at 350.

Medical Opinions Regarding Hearing Loss Causation

Dr. Goodman

The April 13, 2004 audiogram showed a 39.4% hearing loss on the left side and normal hearing on the right side, for a binaural hearing loss of 6.6%. GX 7 at 67. Dr. Goodman issued a report on April 20, 2004 in which he noted that the April 13, 2004 audiogram revealed "mild hearing loss in the right ear . . . [and] an asymmetric hearing loss on the left ear with . . . poor word discrimination." GX 7 and 64. Dr. Goodman also noted, "[Claimant] had no history of ear

surgery or other chronic ear infection." GX 6 at 62. Dr. Goodman also noted, "Of significance are several factors with respect to [Claimant's] work. He works as a barge foreman. He has been working for Global for approximately eight years. He works in a high noise environment, around machinery and ships. [Claimant] feels that his hearing has decreased due to his work." GX 7 at 62. Dr. Goodman also noted, "Of significance also is the fact that [Claimant], approximately 10-12 years ago, was 'knocked out.' He was hit in the head with a 5" nylon rope, which apparently caused a concussive injury. He did not have a definite hearing loss after this, however. This injury was, apparently, significant." GX 7 at 62. Dr. Goodman also noted that Claimant worked with ammunition while in the military from 1955 to 1959. GX 7 at 62. Dr. Goodman concluded, "Due to the fact that [Claimant] has not been adequately worked up, I would suggest getting an MRI of the head to rule out an acoustic neuroma or other organic causes of this gentleman's hearing loss. I would also like to see any reports from hearing testing that has been performed in the past, which would determine the exact temporal sequence of his hearing loss. Without the above information, I cannot make a definitive diagnosis or recommend treatment at this time." GX 7 at 65.

Dr. Gillick

Dr. Gillick was permitted to opine on hearing loss causation because it is part of his daily work as an occupational medicine specialist. Tr at 461. Although he is not a board-certified otolaryngologist, he has administered "a couple hundred" audiograms and overseen "maybe 80,000" through his work in the military. Tr at 522.

Dr. Gillick testified that "the audiologist is not going to know [the cause of hearing loss] unless he does a careful occupational history." Tr at 462. Based on his occupational history of Claimant, Dr. Gillick determined that Claimant held his walkie-talkie in his right hand and listened on his right side, while doing work with his left hand and turning his left side toward the noise so that he could hear. Tr at 462. Dr. Gillick opined that Claimant's hearing loss was causally related to his work, and that Claimant's practice of turning his left ear toward noise when using his radio would make the left ear more susceptible to damage and produce a great hearing loss on that side. Tr at 462; 523-24. Dr. Gillick testified that "[t]his is a very, very common thing." Tr at 462.

Dr. Gillick testified that Claimant's occupational history supports work-related causation, unless there is a tumor or some specific pathology. Tr at 462. Dr. Gillick testified that he had reviewed an MRI or CT scan taken of Claimant's brain on February 14, 2001, which was the day after Claimant's 2001 audiogram. Tr at 462, 530-32, 536-37, 551-52. He stated, Claimant "had a CT scan of the skull which shows no acoustic neuroma." Tr at 462. Counsel for Global objected to Dr. Gillick basing his opinion about causation of Claimant's hearing loss on the CT scan because he had not seen or been aware of any CT scan in the record. Tr at 531-32. However, Dr. Gillick testified that he was not basing his opinion on the CT scan. Tr at 532.

Dr. Gillick denied that noise-induced hearing loss should be symmetrical. Tr at 523. He testified that "a disparate hearing loss tells you something about occupation . . . . [u]nless there is underlying and other disease processes, like tumor." Tr at 524. Dr. Gillick testified, "I find nothing in the literature and nothing in anything that I've examined that would suggest any other

causation." Tr at 524. He testified that people who have predominant, unprotected noise input in one ear will have disproportionate hearing loss in that ear, including people in rock bands and people who fire guns. Tr at 524.

Dr. Gillick testified that Claimant's head injury was a "much less likely, and much more speculative" cause of his hearing loss than exposure to noise at work. Tr at 524-26. This opinion was based in part on examining numerous military personnel with head injuries and finding that usually they do not have hearing loss unless there has been noise or an explosion. Tr at 527. Dr. Gillick also testified that if Claimant's hearing loss had been caused by his head injury, he would have noticed it at that time because "hearing loss associated with trauma is sudden onset . . . [a]nd people know that they've got the hearing loss." Tr at 548.

Dr. Gillick denied that Claimant's work for either Global or Keller was the sole cause of his hearing loss since "most hearing loss due to noise is cumulative . . . over a period of time," but he opined that Claimant's work for Keller was "a contributor" to his hearing loss. Tr at 529-30. Dr. Gillick testified that, without records of regular audiograms over the years, he could not apportion Claimant's hearing loss over different years or different employment. Tr at 546. When asked about the fact that the 2004 audiogram had similar results to the 2001 audiogram and did not show much, if any, additional hearing loss, Dr. Gillick agreed that "whatever the noise level he had [at Global in the year between the February 2001 audiogram and when he left work in March 2002] has not caused any new or progressive hearing loss into the right [ear]." Tr at 556. He testified that Claimant's hearing loss in the left ear was already significant and "[o]nce you reach a certain point you don't get any further degradation in some of the higher frequencies [of] hearing loss." Tr at 553-56.

Analysis of Hearing Loss Causation

As stated above, to invoke the section 20(a) presumption, Claimant must show that he suffered a hearing loss and working conditions existed that could have caused that hearing loss.

Claimant asserts that the section 20(a) presumption is met by his testimony that he was exposed to loud noises without hearing protection in all of his employment, and that Dr. Gillick provided a reasoned explanation for Claimant's asymmetrical hearing loss. Global argues that Claimant has not met the section 20(a) presumption because Claimant has submitted no evidence from a board-certified otolaryngologist regarding his hearing loss and its cause. Similarly, Keller argues that Dr. Gillick's opinions should not be credited because he is not a board-certified otolaryngologist and his opinions are not based on an evaluation of Claimant's hearing ability or his related medical records. ALJX 6 at 25.

I find that the 2001 and 2004 audiograms show that Claimant has suffered a hearing loss. Claimant presented his own testimony and the testimony of Mr. Muschong that Claimant was exposed to loud noise throughout his employment and he rarely wore hearing protection. Tr at 128-29, 345-46, 987. Claimant also presented the testimony of Dr. Gillick that Claimant's exposure to loud noises at Global and Keller each contributed to his hearing loss. Tr at 462, 529-30. While a board-certified otolaryngologist is required for an audiogram to constitute presumptive evidence of the extent of hearing loss, 20 C.F.R. § 702.441(b), a person need not be

a board-certified otolaryngologist to opine on causation of hearing loss. Despite the fact that he is not an otolaryngologist, I find Dr. Gillick credible on these issues in part because of his extensive experience with audiograms while working in the military. Tr at 522. Lastly, I find that, while it would have been more thorough if Dr. Gillick had reviewed all of Claimant's medical records and conducted a full examination, Dr. Gillick nevertheless had sufficient information to render his opinion. Thus, I find that the evidence presented by Claimant is sufficient to raise the section 20(a) presumption.

Next, the burden shifts to the employer to rebut the presumption by presenting substantial evidence that the injury was not caused by the claimant's employment. *Dower*, 14 BRBS 324. Both Global and Keller assert that Claimant's hearing loss was caused by his head injury in the mid-1980s. ALJX 5 at 42-43; ALJX 6 at 14-15. Global contends that, since Claimant only has hearing loss on the left side, it must be attributable to this injury to the left side of his head. ALJX 5 at 43. Global also notes that Dr. Goodman could not determine at the time of the 2004 audiogram that Claimant's hearing loss was work related because he had not reviewed Claimant's MRI to rule out acoustic neuromas or other non-work-related causes. GX 7 at 65. Claimant asserts that there is no competent, substantial evidence from Employers to rebut causation because Dr. Goodman stated that he was unable to opine on causation, and the MRI did not demonstrate any acoustic neuromas or other nonindustrial causes. ALJX 4 at 63.

I find that Employers have not presented any medical opinions or evidence supporting their contention that Claimant's head injury caused his hearing loss. I also find that the absence of an opinion from Dr. Goodman on the issue of causation neither supports nor rebuts the presumption that Claimant's hearing loss was work related. Lastly, I note that Employers elicited testimony that Claimant was occasionally exposed to loud noise in the Air Force. However, without a medical opinion that the exposure to noise in the Air Force caused Claimant's hearing loss, this evidence does not meet Employers' burden. Thus, I find that Employers have failed to present substantial evidence sufficient to rebut the section 20(a) presumption. However, assuming *arguendo* that the presumption had been rebutted, I will weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop*, 14 BRBS 927.

First, I find that the 2001 and 2004 audiograms show a significant hearing loss in the left ear. GX 13 at 252; CX 3 at 154, 320; GX 7.

Second, I reject the argument that Claimant's hearing loss is due solely to his head injury. Dr. Gillick testified that Claimant's head injury was a possible but not probable cause of his hearing loss. Tr at 524-27. Claimant testified that he did not believe his hearing loss was related to his head injury because his hearing loss occurred later. Tr at 347-50. In addition, I find Claimant credible that he had a habit and custom of turning his left ear toward noise sources so that he could more effectively use his microphone and radio on his right side, and I find Dr. Gillick credible that such a practice would cause hearing loss in the left ear. Based on all of this testimony, I find that Claimant's hearing loss is not due solely to his head injury, and that Claimant's employment caused or at least contributed to his hearing loss.

There is also insufficient evidence to establish that Claimant's hearing loss is due to noise exposure when he was in the Air Force. Claimant testified that he had limited exposure to loud

noise because he worked primarily in the bomb dump, which was in a remote location, and he only occasionally went to the flight line. Tr at 119, 827-28, 1001.

Third, I reject the argument that Claimant has not proven that his hearing loss is work related because Dr. Goodman never opined on causation and Dr. Gillick was not properly qualified or informed to opine on causation. Dr. Goodman did not state that Claimant's hearing loss was not work related, but rather, he stated that he would need to review the MRI to rule out any non-work-related causes. Dr. Gillick testified that he did review a CT scan from February 14, 2001 and found that it did not show acoustic neuromas or any cause of Claimant's hearing loss other than cumulative acoustic microtrauma. Tr at 462, 530-32, 536-37, 551-52.[6]

For all of these reasons, I find that Claimant's work caused or contributed to his hearing loss. I also find, specifically, that Claimant's work for Keller in 1996 and 1997 caused or contributed to his hearing loss. I find credible the testimony of Claimant and Mr. Muschong that Claimant was exposed to loud noise and did not wear hearing protection while working for Keller. Although there is no audiogram to show the amount of Claimant's hearing loss at the time Claimant left employment with Keller, I find that the other evidence regarding Claimant's work conditions and habits supports a finding that Claimant sustained hearing loss while working for Keller.

Lastly, the fact that Claimant did not have any complaints of hearing loss or any audiograms showing hearing loss until his subsequent employment for Global does not absolve Keller from liability. The last employer covered under the Longshore Act is liable for the entirety of claimant's hearing loss regardless of whether the disease was aggravated by subsequent non-covered employment. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991), (citing *Johnson v. Ingalls Shipbuilding Div*., 22 BRBS 160 (1989); and *Labbe*, 24 BRBS 159). Thus, because I found that Keller caused or contributed to Claimant's hearing loss, it is liable for the entire hearing loss shown by the 2004 audiogram, despite the fact that it may also include some aggravation from Claimant's subsequent work for Global. Where there is no evidence of the extent of a claimant's hearing loss at the time he leaves covered employment, a judge may award benefits for hearing loss based on the most credible evidence of record, including a reliable audiogram from much later in time. *Dubar*, 25 BRBS 5 (upholding award of benefits based on a 1988 audiogram when the claimant left covered employment in 1971 and the first audiogram was done in 1984); *Labbe*, 24 BRBS 159 (upholding award of benefits based on 1986 audiogram when the claimant left covered employment in 1963 and a 1967 audiogram was discredited as unreliable); *Steevens*, 35 BRBS 129 (upholding award of benefits based on 1998 audiogram when the claimant left covered employment in 1975 and the 1985 and 1992 audiograms were rejected as unreliable). *But see Bruce v. Bath Iron Works*, 25 BRBS 157 (upholding finding that 1968 audiogram could not reliably be projected back to find that the claimant had sustained hearing loss by 1953).

For the reasons above, I find that Claimant's work for Keller contributed to his hearing loss and that Keller is responsible for the entire hearing loss shown by the 2004 audiogram.

[6] I note that the evidence shows that Claimant was scheduled for an MRI/CT scan on February 14, 2001, CX 3 at 232, and that Claimant was told on February 22, 2001 that his MRI was negative, CX 3 at 229. However, the MRI/CT scan test results themselves are not included in the trial evidence.

Intervening cause

Global asserts that even if Claimant's work for Global in 1998 on the *Iroquois* and Billy Starbuck's barges was covered and contributed to his injuries, his continued employment with Global through March 2002 on the *Seminole* (during which he was previously found to have been a seaman) was an intervening cause. ALJX 5 at 45-46. Similarly, Keller asserts that even if Claimant's work for Keller in 1996-97 was covered and contributed to his injuries, his work for Global in 1998-2002 was an intervening cause. ALJX 6 at 10-11, 14, 16.

Where the last covered employer seeks to be absolved of partial or total liability based on subsequent non-covered work, the responsible employer must demonstrate that the later work is an intervening cause of the claimant's disability, and the disability is not a natural, unavoidable result of the original work injury. *Buchanan v. International Transportation Services*, 33 BRBS 32, n.7 (1999) (citing *Shell Offshore, Inc. v, Director, OWCP*, 112 F.3d 312 (5th Cir. 1997); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954); *Plappert v. Marine Corps. Exch.*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Leach v. Thompson's Dairy*, 13 BRBS 231 (1981)). However, even when the last covered employer proves the later work is an intervening cause, the employer remains liable for any portion of the claimant's disability which is attributable to the earlier, covered work and is relieved of liability only for the portion of disability attributable to the intervening cause. *Leach*, 13 BRBS 231; *see also generally New Haven Terminal Corp. v. Lake*, 337 F.3d 261 (2d Cir. 2003); *Marsala v. Triple A South*, 14 BRBS 39 (1981); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987).

Employers in this case have not presented evidence as to the percentage of causation which is attributable to the later, non-covered employment as an intervening cause, even though they were specifically warned that they would need to provide percentages to prevail on this issue. Tr at 11-12. Consequently, there is no way to ascertain what portion of Claimant's disability is attributable to each period of work. Without such apportionment, Keller is liable for the entire disability. *See Plappert*, 31 BRBS at 110; *Bass*, 28 BRBS at 15-16; *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140, 144-45 (1991).

6. Nature of disability/Maximum Medical Improvement (MMI)

Legal Standard for MMI

A disability will be considered permanent if, and when, the employee's condition reaches the point of maximum medical improvement (MMI). *James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask v. Lockheed Shipbuilding & Constr. Co*., 17 BRBS 56, 60 (1985). A disability will also be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th

Cir. 1968). The medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60; *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Blakeslee, Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

Medical Opinions Regarding MMI

Dr. Subin

On October 26, 2004, Dr. Subin recommended against ulnar surgery. GX 13 at 211. Dr. Subin's May 22, 2006 progress note states that Claimant continues to have left thumb pain, should wear a splint, and should return in one month for re-evaluation. CX 23 at 493.

Dr. Gillick

Dr. Gillick testified that he reviewed Dr. Subin's notes and also telephoned Dr. Subin, both of which confirmed that Claimant's conditions were not permanent and stationary and that Dr. Subin was considering another procedure. Tr at 455-59.

Dr. Farran

On the other hand, in his April 19, 2004 report, Dr. Farran opined that Claimant's carpal tunnel condition had reached MMI. GX 5 at 30. Dr. Farran wrote, "In my opinion, [Claimant] has reached maximum medical improvement in regards to his carpal tunnel syndrome and therefore is Permanent and Stationary. Although his nerve conduction time studies seem to show delays of the motor and sensory latencies across the carpal tunnel, this is a common finding despite successful carpal tunnel release surgery. From a clinical point of view, the motor and sensory supply to the hands appears to have returned to normal except for the ulnar neuropathy which appears to be chronic." GX 5 at 30. Dr. Farran added, "The only additional medical care that is required would be for a possible neurolysis and/or transposition of the ulnar nerve which should be on a nonindustrial basis." GX 5 at 30.

In his February 3, 2005 report, Dr. Farran opined, "[Claimant's] neurological condition continues to remain permanent and stationary, as I opined in my April 19, 2004, report. No further treatment is required for his carpal tunnel syndrome. However, the patient does need further management of his ulnar entrapment to consist of elbow padding, anti-inflammatories, and possibly the need for future neurolysis and transposition of that nerve. However, I agree with Dr. Subin that operating on the nerve at this time might lead to further damage and further impair function of the left hand. [Claimant] has probably made the right decision in not having the nerve operated on. More than likely, the ulnar nerve dysfunction will be a permanent neurological disability." GX 5 at 45. He also opined that "any further care of the ulnar nerve should be on a nonindustrial basis. Any surgical treatment that he has received or is planned for the degenerative arthritis should also be handled on a nonindustrial basis. No additional surgeries or conservative treatment appears warranted for treatment of his carpal tunnel syndrome, since he is essentially asymptomatic for that condition at this time." GX 5 at 45.

At the hearing, Dr. Farran was unable to opine on the status of Claimant's conditions at the time of trial because he had not examined Claimant for over a year. Tr at 789-90.

Dr. London

In his April 24, 2004 report, Dr. London opined, "[Claimant] has reached maximum medical improvement in regard to the surgeries for carpal tunnel syndrome." GX 4 at 14. Dr. London added, "He has no permanent disability as a result of his work activities at [Global]. No additional medical treatment is indicated." GX 4 at 14.

Dr. London opined in his February 9, 2005 report, "From the standpoint of his work at [Global], his condition remains permanent and stationary. He is still in a period of recovery from his left thumb surgery. He may have difficulty with his left upper extremity with forceful gripping, forceful pushing or pulling because of the need for resection arthroplasty at the base of his left thumb . . . .He is not in need of any additional medical treatment." GX 4 at 19.

Dr. London noted in his May 12, 2006 report that since his last evaluation of Claimant on February 4, 2005, Claimant had continued to be treated by Dr. Subin, including receiving Cortisone injections that did not bring any improvement and wearing a neoprene sleeve on his left wrist and a splint at night. GX 31 at 1230. Dr. London also opined, "From the standpoint of his work at [Global], his conditions remain permanent and stationary . . . . He is not in need of any additional medical treatment at the present time but, as noted by Drs. Farran and Ohayon, he could need additional treatment to the left elbow if his symptoms progress on a nonindustrial basis." GX 31 at 1235.

At the hearing, Dr. London testified that Claimant's carpal tunnel had continued to be permanent and stationary with no need for further medical treatment since his April 2004 examination. Tr at 675, 687-88, 690-91, 695, 702-03. Dr. London also testified that Claimant's left thumb condition is at MMI. Tr at 702-03. Dr. London testified that he would be reluctant to recommend the fusion procedure that Dr. Ohayon would propose to Claimant. Tr at 721-22.

Dr. Ohayon

Dr. Ohayon opined in her February 2, 2006 report, "It is my opinion that [Claimant] has significant ongoing symptoms related to his basilar joint arthritis and subsequent surgery. However, these are nonindustrial in nature. Per the patient's report, Dr. Subin has discussed the option of further surgery for his left basilar thumb arthritis . . . ." KX 4 at 25. She also opined, "From the standpoint of the ulnar nerve entrapment, I agree with Dr. Farran that if [Claimant's] ulnar nerve symptoms increase, that at some point in the future he may require reevaluation and treatment on a non industrial basis." KX 4 at 25. Lastly, Dr. Ohayon opined, "With regard to his bilateral carpal tunnel syndrome, I believe he is permanent and stationary and that his surgery has been both appropriate and successful." KX 4 at 25.

Dr. Ohayon wrote in her May 3, 2006 report, "I do believe that he still requires further treatment for his condition given his level of symptoms on his examination 02-02-06."

However, it is unclear whether she is referring to all of his upper extremity conditions or just his arthritis. KX 4 at 15.

At the hearing, Dr. Ohayon opined that a patient normally reaches MMI between six months and one year after undergoing carpal tunnel release surgery, but individuals differ. Tr at 1280-83. Dr. Ohayon testified that "it would have been somewhere in that time frame" for Claimant. Tr at 1281. Dr. Ohayon testified that Claimant had reached MMI at the time she examined him on February 2, 2006. Tr at 1288. Dr. Ohayon testified, "There are some residual effects on the nerve, but he had a successful release. So he would be considered MMI for his carpal tunnel on both sides." Tr at 1288.

With regard to Claimant's December 8, 2004 left thumb surgery, Dr. Ohayon testified that it varies from surgeon to surgeon but "usually it would be four to six weeks in a cast." Tr at 1283. She testified, "Some of my patients, they go back to work doing one-handed work after several weeks. He would be released to modified duties usually, at the latest, when he gets out of the cast. And then, in terms of MMI, it really depends on how he does. If everything goes well, I would think that . . . six months to a year is a reasonable time for MMI." Tr at 1283.

Dr. Ohayon testified that she would offer Claimant further surgery for his left hand because the arthroplasty did not do well and he has persistent symptoms related to the arthritis. Tr at 1305. She would not recommend surgery for Claimant's ulnar nerve. Tr at 1285-86.

Analysis of MMI

Claimant asserts that he has not reached MMI for his upper extremity conditions because he is receiving ongoing treatment from Dr. Subin, and he may require additional surgery. ALJX 4 at 32-33, 65. He asserts that "[a]t least some of the employers' own medical consultants believe some of [his] hand conditions require further treatment; none articulated that such treatment would be palliative only . . . ." ALJX 4 at 65.

Global asserts that Claimant's carpal tunnel reached MMI on April 19, 2004 based on Dr. London's and Dr. Farran's evaluations. ALJX 5 at 48. Similarly, Keller asserts that Claimant's carpal tunnel has reached MMI. ALJX 6 at 13. Keller also asserts that Claimant's hearing loss reached MMI no later than the first audiogram on February 13, 2001, because the April 13, 2004 audiogram shows no change. ALJX 6 at 15.

At the outset, I note that the concept of MMI is not relevant to hearing loss claims. In contrast, with regard to Claimant's upper extremity conditions, the issue of MMI is relevant to determining whether Claimant's disability is temporary or permanent, which in turn affects how his disability compensation is calculated.

I noted at the hearing that none of the parties had presented evidence as to the extent, or percentage rating, of Claimant's disability in the event that I were to find that his upper extremity conditions were work related and had reached MMI. Tr at 272-75. The parties acknowledged that they had not presented such evidence and it would have to be presented in a subsequent hearing, if necessary. Tr at 273-75. At the end of the hearing, Keller attempted to elicit

testimony from Dr. Ohayon about permanent disability ratings based on the American Medical Association ("AMA") guides, but based on Claimant's objection, it was not permitted. Tr at 1287-89. I find that the fact that Employers failed to prepare or present any testimony about the extent of Claimant's permanent partial disability undermines their claims that his upper extremity conditions are at MMI.

I find that Claimant is still actively treating with Dr. Subin. Tr at 365. Claimant testified that Dr. Subin had never discussed whether his conditions were permanent and stationary, and he still had upcoming appointments. Tr at 1031. Claimant testified that he continues to use splints given to him by Dr. Subin because they help reduce his pain symptoms. Tr at 264. Claimant testified that he is willing to consider additional corrective surgery. Tr at 312-13. He testified, "I need more work on my hands to relieve the pain that I'm having." Tr at 313.

With regard to Claimant's carpal tunnel, the evidence supports a conclusion that his condition reached MMI by April 2004. However, where a claimant suffers more than one injury to the same member, he is limited to one scheduled award. *Clark v. Todd Shipyards Corp*., 20 BRBS 30 (1987), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125 (9th Cir. 1988); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). More specifically, "where an injury to the lesser member also affects the greater, the Act provides for compensation equal to the amount which could be received for loss of use of the greater member alone." *Mason*, 22 BRBS at 416. Injuries below the elbow, including carpal tunnel and other injuries to the wrist, may be considered as scheduled permanent partial disabilities to the arm under Section 8(c)(1) rather than as a disability to the hand under Section 8(c)(3). *Stokes v. George Hyman Construction Co.*, 19 BRBS 110 (1986); *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 886 (1978); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978); *Scott v. Army Central Ins. Fund*, 30 BRBS 412, 420 (ALJ) (1996); *Obrist v. Port of Portland*, 22 BRBS 333 (ALJ) (1989). Thus, Claimant is entitled to one permanent partial disability award for each arm based on all of his upper extremity conditions, not a separate award for each condition. Because Claimant is limited to a single award for each arm based on all of his upper extremity conditions, a finding of MMI only for Claimant's carpal tunnel syndrome has no legal effect.

With regard to Claimant's arthritis conditions, Claimant was still under evaluation and treatment by Dr. Subin for his left thumb arthritis condition as of May 22, 2006, just prior to the hearing. CX 23 at 493. Because Dr. Subin is entitled to deference as the treating physician, I find that Claimant's arthritis conditions have not reached MMI. Moreover, I note that Dr. Ohayon opined that she would offer Claimant further surgery for his left hand due to the lack of success of the first surgery and his persistent symptoms. Tr at 1305.

With regard to Claimant's ulnar nerve conditions, Dr. London, Dr. Farran, and Dr. Ohayon each opined that Claimant requires additional treatment and possibly surgery. GX 5 at 30, 45; GX 31 at 1235; KX 4 at 25. However, they each qualified that such future treatment would be "on a nonindustrial basis" due to their opinions that the ulnar nerve conditions are not work related. Because I have found that Claimant's ulnar nerve conditions are work related, these opinions support the conclusion that these conditions are not at MMI.

Based on all of the above, I find that Claimant has not reached MMI for his upper extremity conditions. Consequently, Claimant is only entitled to temporary disability compensation at this time, and not a scheduled permanent partial disability award for his upper extremity conditions. *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 235 (1985).

Past Treatment

Although it was not specifically raised by the parties as an issue, I will briefly address the reasonableness and necessity of Claimant's treatment thus far because there was some dispute between the physicians in this case.

Dr. Subin performed a right carpal tunnel release on September 10, 2002, and a left carpal tunnel release on October 29, 2002. CX 3 at 181, 192-96, 204; GX 10 at 84-102. There is no dispute about the reasonableness of these surgeries. Tr at 709-11.

On December 8, 2004, Dr. Subin performed a left thumb arthroplasty. CX 3 at 8; GX 10 at 113-121; GX 13 at 175-76, 180-91, 198-206. There was some dispute about whether this surgery was appropriate. Dr. London stated in his May 12, 2006 report, "I agree with Dr. Ohayon that [Claimant] has undergone appropriate treatment . . . ." GX 31 at 1235. However, at the hearing, Dr. London testified that he was "surprised" that Claimant had surgery on his left thumb, because most mild levels of arthritis are not treated surgically. Tr at 680, 685. Dr. London testified that he himself "would have tried further conservative treatment . . . [and he has] never performed that operation for mild arthritis, because most patients are able to cope." Tr at 686. However, he agreed that reasonable doctors could disagree about the appropriateness of that surgery, and patients could differ in their willingness to proceed with that surgery. Tr at 710. He conceded that the treating physician usually has a better understanding of the patient and their goals, and that Claimant had not sought any unnecessary treatment. Tr at 710.

Based on the general consensus of the medical experts in this case about the reasonableness of Claimant's treatment and the deference to which Dr. Subin is entitled as Claimant's treating physician, I find that all of Claimant's treatment and surgeries for his upper extremity conditions have been reasonable and necessary.

7. Extent of Disability

A. Extent of Disability Based on Upper Extremity Conditions

Because Claimant's upper extremity conditions are not yet at MMI, it is necessary to analyze whether he is partially or totally disabled for purposes of calculating his temporary disability compensation.

Relevant Dates for Evaluating Extent of Disability

There is some confusion about whether Claimant's last day of work was March 27, 2002 versus March 28 due to the fact that Claimant was working overnight shifts. Tr at 360. I find

that Claimant was employed by Global on March 28, 2002 and first lost time due to his heart condition on that date. Tr at 241, 360; GX 1 at 2; GX 14 at 308.

I find that Claimant was not disabled within the meaning of the Longshore Act, and thus not entitled to compensation, from March 29, 2002 through the date when his upper extremity conditions first became disabling. Although he was not working during that period, Claimant was not disabled because, but for his non-work-related heart problems, he would have continued working until his upper extremity conditions became disabling. Thus, there is an issue as to the exact date when Claimant's upper extremity conditions became disabling. Because Claimant was already off work due to his heart condition, there are no medical records taking Claimant off work due to his upper extremity conditions, prescribing light duty or work restrictions due to his upper extremity conditions, or other clear indications of when or to what extent these conditions became disabling. In the absence of such evidence, I must determine the date when Claimant's upper extremity conditions were first diagnosed and assume that the work restrictions that were recommended later would have been given at the time of diagnosis if Claimant had been working. I note that Claimant was diagnosed with arthritis in his hands as early as 1999, but that condition alone was not disabling given that Claimant continued working. Thus, I will focus on when Claimant's carpal tunnel syndrome first became disabling.

Claimant asserts that he is entitled to temporary disability compensation as of June 28, 2002, which is the date of Dr. Meyer's release from a cardiac standpoint. On June 28, 2002, Dr. Meyer wrote a letter stating, "I had initially released [Claimant] to work on May 15, 2002. Since then [Claimant] developed fatigue, headaches and numbness in his hands and arms. A cardiac stress test was performed on 6/14/02, which is negative for cardiac ischemia. In my professional opinion [Claimant's] symptoms are not cardiac related and I have advised him to follow up with his primary care physician. [Claimant] is released to work from a cardiac standpoint on June 14, 2002." GX 8 at 74, 75; GX 12 at 144; GX 14 at 307; GX 16 at 335. On August 1, 2006, Dr. Meyer wrote a letter/declaration stating that he had released Claimant to return to work from a cardiac perspective after his June 14, 2002 stress test. CX 32. Dr. Meyer stated, "[Claimant] had numbness in [his] arms and hands but I didn't get details concerning these complaints, I simply referred him to a primary care physician for evaluation and treatment." CX 32.

I note that Dr. Meyer did not diagnose any upper extremity conditions, prescribe any restrictions, or note that Claimant's symptoms limited his ability to work on June 28, 2002 or any other date. Thus, I find that Claimant has not presented any evidence to support his assertion that he is entitled to temporary disability compensation as of June 28, 2002.

The evidence shows that on June 26, 2002, Claimant was seen by Dr. Eugene Kwon, who found negative Phalen's sign and was "concerned about the possibility of carpal tunnel syndrome." CX 3 at 215, 218. Dr. Kwon then referred Claimant to Dr. Randall Hawkins. CX 3 at 218. On July 25, 2002, Dr. Hawkins conducted NCV studies and diagnosed severe bilateral carpal tunnel. CX 3 at 217-19. Dr. Hawkins referred Claimant to Dr. Subin as an "orthopedic hand specialist for a surgical approach as his motor distal latency prolongation would suggest a poor prognosis on purely conservative management." CX 3 at 219. On August 12, 2002, Claimant was evaluated by Dr. Subin, who noted Dr. Hawkins' NCV studies and also diagnosed

bilateral carpal tunnel syndrome. CX 3 at 211-12, 216. Dr. Harrison testified that the NCV studies are the "gold standard" for making a diagnosis of carpal tunnel. Tr at 1213-14.

Although the diagnosis of carpal tunnel syndrome was not officially confirmed until July 25, 2002 NCV studies, it was suspected on June 26, 2002 by Dr. Kwon. Moreover, Dr. Meyer's June 28, 2002 letter documents that Claimant's hands were bothering him around the June 2002 timeframe, so it is reasonable to find that he had carpal tunnel syndrome and it had a disabling effect at that time. In addition, Dr. Ohayon testified that, given Dr. Meyer's release from a cardiac standpoint, Claimant would have been available for some type of work between June 2002 and his surgery in September 2002. Tr at 1280. Although not contemporaneous with the diagnosis, various physicians recommended physical restrictions for Claimant based on his carpal tunnel and other upper extremity conditions.

Based on all of this evidence, I find that Claimant's upper extremity conditions had become disabling and he was at least temporarily partially disabled as of June 26, 2002.

Claimant also had at least two periods of temporary total disability ("TTD"), following his September 2002 and October 2002 CTS surgeries and his December 2004 left thumb surgery. However, because there is no clear or contemporaneous evidence of the exact dates of these periods of TTD, I must estimate them based on evidence from Dr. Subin and Dr. Ohayon.

First, Dr. Subin performed a right carpal tunnel release on September 10, 2002 and a left carpal tunnel release on October 29, 2002. CX 3 at 181, 192-96, 204; GX 10 at 84-102. Dr. Subin recommended that Claimant be off work for at least four weeks following each of his carpal tunnel release procedures. GX 14 at 306. On December 26, 2002, Dr. Subin recommended continued therapy and possible injections and further procedures, and noted that Claimant "remains temporarily totally disabled from being able to perform his regular work duties." CX 3 at 182; GX 10 at 104; GX 14 at 305. Claimant was certified as off-work (at least for disability insurance purposes) from January through April 2003. GX 14 at 298, 301, 303.

Dr. Ohayon testified that Claimant's carpal tunnel surgeries were performed "in a staged fashion" in September and October 2002, and "in that situation usually what will happen is they'll place a patient on total temporary disability for a period of time. And it depends on what the patient does for work, how soon you can release them. And it is very often that they can be released to some form of modified duty after the sutures are out at three weeks. Now in the case of the type of work that [Claimant] did, normally it would be at six months that he would be released back to full unrestricted duty. But from three weeks until six months he would be available for modified work." Tr at 1280-81. Dr. Ohayon explained that modified duty and restrictions are "usually a preclusion from heavy lifting. And it depends on what their grip strength is. But the number that I've thrown out before is ten pounds. [Claimant] would definitely be able to lift ten pounds." Tr at 1281.

Based on the evidence above, I find that Claimant was temporarily totally disabled from September 10, 2002 through November 26, 2002, which is four weeks after his second surgery.

Second, on December 8, 2004, Dr. Subin performed a left thumb arthroplasty surgery to treat Claimant's severe arthritis. CX 3 at 8-10; GX 10 at 113-121; GX 13 at 175-76, 180-91, 198-206. With regard to Claimant's December 8, 2004 left thumb surgery, Dr. Ohayon testified that it varies from surgeon to surgeon but "usually it would be four to six weeks in a cast." Tr at 1283. She testified, "Some of my patients, they go back to work doing one-handed work after several weeks. He would be released to modified duties usually, at the latest, when he gets out of the cast." Tr at 1283.

Based on this evidence, I find that Claimant was temporarily totally disabled from December 8, 2004 through January 19, 2005, which is six weeks after the surgery.

Legal Standard for Extent of Disability

In cases involving disputes over an injured worker's extent of disability, the burden is initially on the claimant to show that he cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980).

If it is shown that the claimant cannot return to his past job due to a work-related injury, the claimant is presumed to be totally disabled unless the employer demonstrates the existence of suitable alternate employment in the geographical area where the claimant resides. *Bumble Bee*, 629 F.2d at 1327; *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing suitable alternate employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, 629 F.2d at 1330. In addition, when considering whether a proposed job is suitable for a claimant, a factfinder must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and employment background would be hired if he diligently sought the proposed job. *Hairston*, 849 F.2d at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258 (9th Cir. 1990).

If the employer makes the requisite showing of suitable alternate employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

i. Claimant's Physical Restrictions

There is a preliminary issue as to which of Claimant's conditions and their associated physical restrictions are relevant to evaluating the extent of Claimant's disability.

Legal Standard for Relevant Conditions/Restrictions

Although it is "well established with respect to the claimant's condition before injury" that an employer takes the employee as it finds him, "[t]he employer cannot reasonably be held responsible for changes in condition, or new conditions, arising after the injury, unless the injury

caused or accelerated those changes." *Zahn v. Hugo Neuproler Co.*, 21 BRBS 585, 607 (ALJ)(1988). Thus, only those conditions and work restrictions that preceded or were caused or aggravated by the work injury may be taken into account when determining a claimant's degree of disability. In other words, "[w]hether the claimant's compensable permanent disability is total or partial, therefore, depends on whether he would be employable in available positions with the . . . limitations arising from the injury, and with the [condition] existing at the time of the injury, but without regard to further progress in the [pre-existing condition]." *Id.* Conditions or work restrictions that are unrelated to and arise after the work injury may not be taken into account. *See, e.g., Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998)(citing cases that held that a claimant's pre-injury criminal record may be considered in determining suitable alternative employment, but that post-injury incarceration or criminal penalties (especially where temporary) should not be considered).

a. Heart Condition

First, there is an issue as to whether Claimant's restrictions related to his heart condition (i.e., the restriction to sedentary employment) should be taken into account in determining suitable alternative employment, given that his March 2002 heart attack is explicitly not at issue in this decision because it occurred during non-covered employment, his 1999 and 2002 heart attacks occurred during non-covered employment with Global, and there is no evidence that any of Claimant's covered work contributed to his heart condition.

Medical Evidence Regarding Claimant's Heart Condition

Claimant's medical records confirm that he had heart attacks in 1999 and 2002, and had coronary stent procedures in 1999, 2002, and 2003. Tr at 241-42, 405, 853; CX 3 at 49, 70, 74, 79, 82, 88, 98, 171; CX 12 at 420; CX 25 at 507-515; KX 4 at 18; GX 6 at 50-51; GX 8 at 69-73; GX 9; GX 12 at 150-51, 167; GX 13 at 212, 216; GX 14 at 314; GX 16 at 341.

On April 15, 2002, Dr. Meyer noted that Claimant's problems with chest pain had been "possibly life long." GX 12 at 152; GX 14 at 316, 343; GX 16 at 343.

In his February 3, 2005 report, Dr. Farran opined, "Any disability [Claimant] has at this time is based on the natural progression of his underlying cardiovascular condition and other nonindustrial injuries . . . ." GX 5 at 45.

Dr. Jonathan Green was retained as a medical expert by Global to evaluate Claimant's cardiac condition. GX 6; GX 22 at 548-49. Dr. Green's February 10, 2005 report focuses on Claimant's cardiac condition. GX 6. Dr. Green opined, "With regard to the issue of causation, the underlying problem here is what we call Coronary Artery Disease. This is a condition that causes heart attack. Coronary disease takes years and years to develop, often up to 20 years, and is related to what we call 'risk factors.'" GX 6 at 56-57. Dr. Green noted that Claimant "has multiple risk factors for heart disease" including "historically abnormal blood cholesterol," having been "a long-term cigarette user," "high blood pressure," and "a family history of heart disease." GX 6 at 57. Dr. Green stated, "Having these risk factors gives the patient a very, very high risk for the development of heart disease." GX 6 at 57.

Claimant reported to Dr. Green that his work was stressful. GX 6 at 51-52. However, Dr. Green opined, "I do not see any documentation within the medical file to suggest that either [of] the 1999 and 2002 heart problems were in any way related to job stress. There is just no evidence from the file that stress ever played a role here. Indeed, the 1999 chest pain occurred during a ten-day period when the patient was not working while in San Diego. The heart attack itself actually was precipitated when the patient had to lift up his stepdad and both stepdad and [Claimant] were admitted to the hospital." GX 6 at 57. Dr. Green concluded, "I do not see, therefore, any evidence that there is a continuous trauma injury or aggravation as a result of the patient's work for Global." GX 6 at 58.

Dr. Green also noted that "at the time of [Claimant's] pre-placement examination for Global, there was calcification of the aorta which is a sign of long-standing hypertension and high cholesterol as well as smoking leading to atherosclerosis in the aorta. This indicates most likely that the disease in the heart was already progressing due to the same atherosclerotic process." GX 6 at 58. Dr. Green also opined, "With regard to the heart attack occurring in March 2002, this was related to stenosis or blocking off of the initial stenting. This is a known side effect of the stent procedure related to progressive scarring and disease progression. This has absolutely nothing to do with the patient's work for Global but rather [was] due to progressive scarring of the prior stent that was used to open up the blockage at the time of the 1999 heart attack." GX 6 at 58.

Analysis of Relevance of Claimant's Heart Condition/Restrictions

As stated above, "[t]he employer cannot reasonably be held responsible for changes in condition, or new conditions, arising after the injury, unless the injury caused or accelerated those changes." *Zahn*, 21 BRBS at 607.

I find that Claimant had a long-standing, underlying heart condition that preceded his employment for Global and Keller. Claimant performed strenuous work for many years with this underlying heart condition. Thus, Claimant's underlying heart condition should be taken into account since it existed when he began working for Employers. However, the heart condition as it existed when he began working for Employers has no effect on the extent of Claimant's disability because it did not limit his ability to perform his usual work.

Claimant's heart condition worsened during and after his employment with Global, as evidenced by the fact that he had heart attacks in 1999 and 2002 and subsequent treatment for his heart, including procedures in 1999, 2002, and 2003. However, Keller may only be held responsible for Claimant's worsened heart condition, and the associated work restrictions, if Claimant's work for Keller caused or accelerated the changes in his heart condition. The trial evidence does not include any medical opinions that Claimant's heart condition is work related at all, nor does it include any evidence that Claimant's work for Keller aggravated that condition. On the other hand, Dr. Green specifically opined that Claimant's heart condition is not related to his work. GX 6 at 56-58. Thus, because Claimant's heart condition worsened after his covered employment and the worsening was not causally related to his covered employment, Keller may not be held responsible for his worsened heart condition. Thus, Claimant's worsened heart

condition should not be taken into account in determining whether Claimant can perform suitable alternative employment and he is not limited to sedentary employment for purposes of that determination, since that restriction was based on his worsened heart condition.

b. New Conditions

At the hearing, I ruled that Claimant's newly raised shoulder, eye, and knee conditions would be excluded and must be addressed through another claim. Tr at 89, 91, 99, 252-56, 656. Claimant's counsel objected that excluding these conditions would result in an incomplete or incorrect analysis of Claimant's ability to perform suitable alternative employment. Tr at 89. Claimant's vocational expert, Ms. Friedman, considered these conditions, at least to some extent, when evaluating jobs. CX 29a. I ruled that Global and Keller would be permitted to submit additional labor market surveys considering these conditions. Tr at 307-09. I ruled that these conditions could be considered to the extent that they limit Claimant's ability to work. Tr at 252-56, 306-09. However, upon further reflection, I find that these conditions, which arose after Claimant stopped working, should not be taken into account in determining whether Claimant can perform suitable alternative employment.

c. Hearing Loss

Claimant has a documented hearing loss in his left ear. GX 7. Claimant also testified that he has problems hearing. Tr at 310. Specifically, he testified that he had problems hearing the attorneys when he was sitting in the gallery section of the courtroom during the trial. Tr at 310-11. He estimated that he heard "40 to 60 percent of what was being said." Tr at 311.

Ms. Friedman considered Claimant's hearing loss as a physical limitation, based on Dr. Goodman's report that Claimant had left ear hearing loss and poor word discrimination. CX 29a. However, Ms. Friedman conceded that when she contacted Sony Electronics she was told that the employer would have some concern about an applicant with hearing loss but that "some hearing loss wouldn't necessarily be a problem, especially if it was corrected." Tr at 1144.

I note that the recommendations at the end of the 2001 audiogram include an amplification device for Claimant's left ear. GX 13 at 252; CX 3 at 154, 320. This, along with the absence of any evidence that Claimant is unable to wear a hearing aid, leads me to conclude that Claimant's hearing loss is at least partially correctable through the use of a hearing aid or otherwise. I also note that Claimant has hearing loss in one ear only, and if required for a job, he could listen to a walkie-talkie or telephone with his other ear. For all of these reasons, I find that while Claimant's hearing loss should be considered, it is unnecessary to exclude any of the jobs on the labor market surveys based on his hearing loss.

d. Upper Extremity Conditions

On December 6, 2002. Dr. Subin followed up after Claimant's carpal tunnel release procedures and noted continuing problems. GX 10 at 103. He stated, "[Claimant's] left thumb at the carpal metacarpal joint is quite painful when he attempts to use his hand for any activity."

GX 10 at 103. On April 11, 2003, Dr. Subin recommended that Claimant "use a thumb wrist splint on an ongoing basis on the left to see if this would alleviate his symptoms." GX 10 at 111.

On July 7, 2003, Dr. Brian Anderson diagnosed osteoarthritis of the hands, and recommended that Claimant "should try to limit any repetitive gripping and grasping activities. He may continue to use his splints, as before, as he finds these helpful at relieving his symptoms." CX 3 at 100.

Dr. London opined in his February 9, 2005 report, "[Claimant] is still in a period of recovery from his left thumb surgery. He may have difficulty with his left upper extremity with forceful gripping, forceful pushing or pulling because of the need for resection arthroplasty at the base of his left thumb. He is perfectly capable of performing sedentary employment at the present time and work that does not involve forceful gripping, pushing, pulling, lifting or carrying with the left upper extremity." KX 4 at 19. Dr. London testified that these restrictions were prophylactic based on Claimant's left thumb surgery, which was not work related. Tr at 695. Dr. London opined that Claimant could at least perform sedentary employment. Tr at 695.

On February 22, 2006, Dr. Subin saw Claimant for continuing pain in his left wrist and thumb, and gave him cortisone injections and a wrist wrap. CX 17 at 442. Dr. Subin noted, "[Claimant] was asked to refrain from any heavy use of his wrist or thumb." CX 17 at 442. On May 22, 2006, Dr. Subin recommended that Claimant wear a thumb splint. CX 23 at 493.

In his May 13, 2006 report, Dr. London opined, "No work restrictions are indicated as a result of the alleged incident of 3/28/02 or his prior work activities. From the stand point of his left thumb surgery, he should be restricted from work that involves forceful gripping, forceful pushing or pulling. No other work restrictions are indicated. These work restrictions, in my opinion, do not relate to the 3/28/02 incident or his work prior to that time." GX 31 at 1235. Dr. London testified that he did not note that Claimant was wearing a splint at his May 12, 2006 examination, but conceded that he may have been wearing one around that time. Tr at 698-99.

Dr. London testified at the hearing that he believed Claimant could return to his usual work, absent work restrictions, "[f]rom the orthopaedic standpoint." Tr at 687-88. Dr. London also testified that Claimant is released to full duties from an industrial standpoint. Tr at 703. However, Dr. London testified that he would add "[r]estrictions related to his left thumb, including work that involved forceful gripping, forceful pushing or pulling." Tr at 703. Dr. London testified that Claimant has no work restrictions for his carpal tunnel or left thumb that are attributable to his work at Global. Tr at 708. Dr. London agreed that it would be appropriate for Claimant to wear a thumb splint if he has ongoing left thumb complaints. Tr at 720-21.

Dr. Ohayon testified in her deposition, "I think he would be capable of doing any kind of sedentary work that does not require heavy use of either hand, maybe with work restrictions of not lifting more than five or ten pounds." Tr at 1319. Dr. Ohayon testified at the hearing that her opinion was still the same but she clarified it by stating, "I went back and looked at his grip strengths when I had evaluated him in the office, and they were actually higher than what I had remembered. I would still say it would be perfectly reasonable for him to have a ten-pound restriction. His grip strength on the left hand, which is the one that's not working as well, was

between 36 and 42 pounds. So basically, what I said in my second deposition was no forceful pinching, and then the ten-pound restriction." Tr at 1320. She agreed that she would consider more aggressive restrictions if Claimant's grip strength continued to decrease. Tr at 1321.

Dr. Subin gave restrictions to Ms. Friedman by telephone on June 23, 2005, which she used in evaluating the proposed jobs. Tr at 961, 1051, 1083-84, 1089-90, 1099, 1111; CX 29a at 547. Dr. Subin's restrictions were no lifting greater than 15-20 pounds; no repetitive activities with both hands; and limited grasping, squeezing, pushing, or pulling with both hands. CX 29a at 547, 560.

Dr. Gillick also spoke to Ms. Friedman on June 13, 2006 about Claimant's medical conditions, based on his June 9, 2006 exam. *See* Tr at 1054-62; CX 29a at 556-57. Dr. Gillick did not give Ms. Friedman formal restrictions, but rather, he explained how Claimant's conditions limited him. Tr at 1059-60; CX 29a at 556-57. However, this information should not be considered, given that it is based on Dr. Gillick's June 9, 2006 exam, about which Dr. Gillick was not permitted to testify. Tr at 434-39.

Global raised some concerns about the fact that Dr. Subin had not issued any written restrictions or testified about any restrictions, and implied that both the restrictions obtained by Ms. Friedman from Dr. Subin and Ms. Friedman's own testimony should not be credited. *See, e.g.*, Tr at 961, 1066, 1083-84, 1090, 1099, 1418, 1423. ALJX 5 at 22. Keller's vocational expert, Ms. Gill, testified that she did not receive any restrictions from Dr. Subin, Dr. Gillick, or Dr. Ohayon. Tr at 1375-76, 1404-06. Ms. Gill testified that she would want an opportunity to reconsider her opinions given Dr. Subin's restrictions. Tr at 1404-06. Mr. Stauber also testified that he did not receive any restrictions from Dr. Subin, and that he relied on restrictions from Dr. London and Dr. Farran. Tr at 1423, 1425, 1427-28, 1441-42. However, Mr. Stauber testified that he was not sure whether he would have been denied access to Dr. Subin to obtain his opinions about Claimant's work restrictions. Tr at 1441.

I find that there is no prejudice to either Employer from the facts that Ms. Friedman received and considered additional information from Dr. Subin and Dr. Gillick about Claimant's restrictions and limitations. The information that these physicians provided to Ms. Friedman was remarkably consistent with the restrictions and limitations noted by these physicians and Employers' own medical experts throughout this proceeding. Consideration of this additional information does not change what positions constitute suitable alternative employment for Claimant. I also note that Employers were given an opportunity to submit additional labor market surveys following the hearing, Tr at 307-09, and they declined to do so. Thus, a remedy was provided for any possible prejudice resulting from Ms. Friedman's having considered this additional information.

Based on Claimant's testimony about his physical limitations and all of the above restrictions recommended by various physicians, I find that Claimant's physical restrictions for his upper extremity conditions are as follows: no repetitive, heavy, or forceful gripping, grasping, pushing, pulling, or squeezing, and no lifting or carrying more than 10 pounds.

ii. Claimant's Ability to Return to His Usual Work

In this case, the parties dispute whether Claimant is capable of returning to his usual work due to his work-related injury. Claimant asserts that he cannot return to his usual work. Global asserts that Claimant is capable of returning to his usual work, but for his nonindustrial work restrictions. ALJX 5 at 50, 52. Global asserts that, for nonindustrial reasons, Dr. London and Dr. Farran recommended that Claimant be restricted to sedentary work with no forceful gripping, pushing, pulling, lifting, or carrying with his left arm. ALJX 5 at 50. Keller asserts that Claimant could return to work as a "hands off" barge foreman, because he was released by Dr. Meyer to return to work in May 2002 after his March 2002 heart attack and again in May 2006 after his 2003 heart attack. ALJX 6 at 23-24.

As stated above, in cases involving disputes over an injured worker's extent of disability, the burden is initially on the claimant to show that he cannot return to his regular employment due to his work-related injury. *Bumble Bee*, 629 F.2d 1327; *Trask*, 17 BRBS 56. In determining whether the claimant has met his burden, the judge must compare the claimant's medical restrictions with the specific requirements of his usual work. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). A physician's opinion that the claimant's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). Also, a claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989). On the other hand, a judge may find a claimant able to do his usual work despite his complaints of pain, numbness, and weakness when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981).

Requirements of Claimant's Usual Work

Claimant's usual work is working as a barge foreman for Global, since that was that last position he held.

Global's job description for the position of barge foreman includes the following specific job requirements: "Must be able to climb stairs and ship ladders," "Must be able to bend over and pick up objects," and "Must be able to ride in a personnel sling/basket between vessels, structures, etc." GX 14 at 310. The synopsis of the key minimum physical demand requirements states, "Barge Foremen must be able to grasp materials and tools of a wide variety of sizes often with considerable grip strength (>60 Lbs). Certain tasks may require a fast work pace in order to complete a job task in a timely fashion so that there will not be a delay in production schedules. Barge Foremen must . . . have good dexterity of their hands to write, use the computer, signal to employees, and to use small hand tools." GX 14 at 310-11. With regard to special senses, the job description notes, "Hearing and understanding the spoken word, bells and horns is essential for carrying out instructions and performing work properly and safely." GX 14 at 311. With regard to carrying, the job description notes that barge foremen must be able to carry with one or two hands 1-30 pounds of hand tools and personal gear on an occasional basis, and must be able to carry a 50 pound fire extinguisher with one hand on an emergency basis. GX 14 at 312. The position is classified as a medium physical demand level because

barge foremen "must be able to perform heavy physical labor," including "lifting, carrying, pushing, and pulling." GX 14 at 312.

Claimant testified that while his title with Global was always barge foreman, his assignments and duties varied. Tr at 136, 240, 990, 1008-09. Claimant's testimony about his work for Global was consistent with Global's job description. Tr at 157, 192-93, 195, 199, 217-19, 231-32, 236. Neither Employer presented evidence that the job description is not representative of the actual duties and requirements of Claimant's usual work.

Claimant's Testimony Regarding His Ability to Return to His Usual Work

Claimant is right-handed. Tr at 831. Claimant testified that he can use his right hand to "dress, shower, eat with it, hold the remote for the TV [and his] coffee cup." Tr at 311, 662. He can open a door and start a car with his right hand. Tr at 662. He is able to lift with his right hand, and testified that he can at least lift a half gallon of milk. Tr at 662-63. He is able to grip a pen and write a note for a short period of time. Tr at 831. However, when he writes or holds his coffee cup for more than a short period, he testified that "my fingers get all locked up, so I have to put it down." Tr at 831. He also testified that he cannot open most jars, and has to use a special tool or have his daughter open them for him. Tr at 312. Claimant conceded that he was able to use the laser pointer with his right hand to point to photos during the trial. Tr at 831.

Claimant testified that he does not try to lift or do anything with his left hand. Tr at 312. He testified that with his left hand he is only able to "pick up a piece of paper or something with just my fingers." Tr at 312.

Claimant testified that his grip strength has decreased over the past couple years and that his left arm is now smaller than his right arm. Tr at 664. He also testified that he "could probably lift [a two-pound shackle,] but it would put me in a lot of pain." Tr at 318. Claimant testified that he could not pass the sea survival test, which is required for many offshore assignments, because of his hands, and especially because he has no strength in his left hand. Tr at 303-05; CX 29a at 559. Claimant testified that his conditions would not even allow him to undergo the travel necessary to get to his usual worksites. Tr at 1019.

Claimant testified that Dr. Subin never released him to any work. Tr at 365. He testified that he never asked for a work release because "I think it's rather obvious I can't . . . . The strength of my hands wouldn't allow me to." Tr at 366. Claimant testified, "I don't believe I've ever discussed the disability [status] with Dr. Subin." Tr at 1030. Claimant testified that he did not understand how Dr. London and Dr. Farran could conclude that he can return to his usual work. Tr at 1019. He testified, "I don't think they understand my scope of work, if they can say that." Tr at 1019.

Medical Opinions Regarding Claimant's Ability to Return to His Usual Work

In his April 19, 2004 report, Dr. Farran summarized Claimant's job description and Claimant's comments about his work. GX 5 at 20-21. Dr. Farran opined, "It is my opinion that [Claimant] can return to his usual and customary duties as a barge foreman without restriction

from a neurological point of view. Given that he is released by Dr. Meyers [sic] from a cardiac point of view and now, by me, from a neurologic point of view, it appears that he could perform his usual and customary duties. However, given his age and cardiac history, it would probably be prudent that he return to a sedentary employment position." GX 5 at 30.

In his February 3, 2005 report, Dr. Farran again summarized Claimant's job description from Global. GX 5 at 35. Dr. Farran opined, "As stated in my initial report, I am still of the opinion that, from a neurological point-of-view, [Claimant] could return to his usual and customary duties. However, because of his age and cardiac status, it is prudent that [Claimant] remain retired. Any disability he has at this time is based on the natural progression of his underlying cardiovascular condition and other nonindustrial injuries such as arthritis of his thumbs, hypertension, dyslipidemia, and his ulnar neuropathy." GX 5 at 45.

In his April 24, 2004 report, Dr. London opined, "[Claimant] is capable of performing his usual and customary work without restrictions." GX 4 at 14. Dr. London opined that as of February 2005, Claimant was capable of returning to work, with prophylactic restrictions based on his recent left thumb surgery, which was not work related. Tr at 695. Dr. London agreed that Claimant can return to his usual work duties without work restrictions. Tr at 708.

In her February 2, 2006 report, Dr. Ohayon summarized Claimant's job description from Global and his own comments about his work for Global and Keller. KX 4 at 18. At the hearing, Dr. Ohayon opined that Claimant can work in a modified capacity. Tr at 1284.

In his October 31, 2005 report, Dr. Gillick detailed Claimant's hand and wrist conditions and surgeries, and opined, "His hand impairments preclude his return to his previous life's work." CX 12 at 417. At the hearing, Dr. Gillick testified, "what jumped out at me from Dr. London's [deposition transcript] was that he felt like [Claimant] could go back to work. And it struck me that here's someone who doesn't understand the kind of work that's being done, and the safety of what's being done." Tr at 497.

At the hearing, Dr. Harrison opined that Claimant is not able to return to his usual work. Tr at 1177. He opined, "If [Claimant] returned to his usual and customary occupation, he would be exposed to the same ergonomic hazards that caused his problems to begin with, and they would present an unnecessary and high and undue risk to [Claimant's] health. They would probably damage further his nerves and cause an aggravation of his hand arthritis. [Claimant] is not capable of performing his usual and customary work. But aside from his medical restrictions, that job alone, independent of [Claimant], is hazardous in terms of causing these conditions. It would be inadvisable in someone who already has these problems to return to that same hazardous job." Tr at 1177-78.

Analysis of Claimant's Ability to Return to His Usual Work

As stated above, to determine whether Claimant has met his burden, I must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit*, 22 BRBS 100. I found above that Claimant's upper extremity restrictions are no repetitive, heavy, or forceful gripping, grasping, pushing, pulling, or squeezing, and no lifting or carrying more

than 10 pounds. Claimant's usual work for Global requires the ability to "grasp materials and tools of a wide variety of sizes often with considerable grip strength (> 60 lbs)" and "good dexterity of their hands to write, use the computer, signal to employees, and to use small hand tools." GX 14 at 311. I find that Claimant's upper extremity restrictions are incompatible with the requirement of his usual work. I also find credible Dr. Harrison's opinion that returning to his usual work would be hazardous and would pose an "unnecessary and high and undue risk to [Claimant's] health" because it would "probably damage further his nerves and cause an aggravation of his hand arthritis." Tr at 1177-78. I again note that a physician's opinion that the claimant's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care*, 21 BRBS 248.

For these reasons, I find that Claimant has met his burden of showing that he is unable to return to his usual, customary employment.

iii. *Availability of Suitable Alternative Employment / Retained Earning Capacity*

As stated above, once it is shown that the claimant cannot return to his usual work, he is presumed to be totally disabled unless the employer demonstrates the existence of suitable alternate employment in the geographical area where the claimant resides. *Bumble Bee*, 629 F.2d at 1327; *Hairston*, 849 F.2d 1194. To satisfy its burden of showing suitable alternate employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee*, 629 F.2d at 1330. When considering whether a proposed job is suitable for a claimant, the judge must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and employment background would be hired if he diligently sought the proposed job. *Hairston*, 849 F.2d at 1196; *Stevens*, 909 F.2d at 1258.

Claimant asserts that he is totally disabled, relying primarily on Sharon Friedman's reports and testimony. Global asserts that there are jobs on the labor market survey prepared by Paul Johnson, Howard Stauber, and Joyce Gill that fit Claimant's restrictions. ALJX 5 at 50-52. In particular, Global asserts that Claimant is capable of performing the yard manager/supervisor position from Howard Stauber's May 12, 2006 labor market survey, which paid between $11.25 and $13.00 in 2002. ALJX 5 at 51. Based on this job, Global asserts that Claimant has a residual wage earning capacity of $13.00 per hour, or $520.00 per week. ALJX 5 at 53. Keller also asserts that the labor market surveys performed by Joyce Gill, Howard Stauber, and Paul Johnson demonstrate suitable alternative employment. ALJX 6 at 24. Specifically, the security and parking lot attendant jobs in Joyce Gill's labor market survey would allow Claimant to sit, stand, or walk at will, with no forceful gripping, pushing, pulling, lifting or carrying. ALJX 6 at 25. Keller emphasized that Claimant did not make a diligent effort to obtain employment and does not have any interest in obtaining a low-paying job. ALJX 6 at 25.

Paul Johnson testified by deposition as a vocational expert for Global. GX 24; GX 22 at 54-5-47. Mr. Johnson has a Master's degree in psychology, he was certified by the U.S. Department of Labor as a vocational rehabilitation counselor, and he has been doing this work since 1976. GX 24 at 791-92, 830. Mr. Johnson estimated that 80 percent of his work is doing labor market surveys, and 20 percent is doing vocational rehabilitation. GX 24 at 796. He

testified that he has done hundreds of labor market surveys, and his work has been about 25 percent for claimants/plaintiffs and 75 percent for defense. GX 24 at 830-31. Mr. Johnson interviewed Claimant. GX 24 at 790. Mr. Johnson reviewed Claimant's medical records, personnel file, and other records. GX 24 at 783-85, 831-33, 839.

Howard Stauber testified at the hearing as a vocational expert for Global. Tr at 1410; GX 32 at 1239-41. Global also submitted Mr. Stauber's deposition testimony and curriculum vitae. GX 36. Mr. Stauber has a Master's degree in vocational rehabilitation counseling and a law degree. Tr at 1411-12. He was certified by the U.S. Department of Labor from 1979 to around 2000. Tr at 1412. Mr. Stauber reviewed and relied upon both of Claimant's depositions, many medical records, physicians' deposition transcripts, Ms. Friedman's documents, and Ms. Gill's transferable skills analysis. Tr at 1416-22, 1442, 1445. Although Mr. Stauber operates out of San Francisco and has not placed employees in San Diego, he denied that he had to make extra assumptions in this case. Tr 1239. Mr. Stauber testified that he was not aware of and had not tested Claimant's penmanship or spelling skills, but he concluded that Claimant's writing skills were satisfactory to have done his work over many years. Tr at 1444-45, 1463-64. He later conceded that Claimant's had misspelled words on his notes from visiting employers, but stated that he did not know if those notes had been done "in a hurried state." Tr at 1462-64. Mr. Stauber did not disclose to any of the potential employers Claimant's age or the fact that he wears a splint, because he was not aware that Claimant wears a splint. Tr at 1481.

Joyce Gill testified at the hearing as Keller's vocational expert and also issued a labor market survey on February 12, 2006. Tr at 1328; KX 5. Keller also submitted a transcript of Ms. Gill's deposition. KX 11. Claimant also submitted a portion of Ms. Gill's deposition transcript. CX 30. Ms. Gill has been working as a vocational rehabilitation counselor since 1976, and has provided services to injured workers under various state and federal workers' compensation systems, including Longshore workers. Tr at 1368. She is also certified by the U.S. Department of Labor as a certified rehabilitation counselor. Tr at 1368. Ms. Gill has been doing this work for 30 years. Tr at 1330-31. Ms. Gill agreed that at least 35 to 40 percent of her practice involves doing labor market surveys, and that the overwhelming percentage, or more than 99 percent, of them have been on behalf of employers. Tr at 1377. Ms. Gill did not meet with Claimant or perform any testing on him, but she testified that she had sufficient information about his work history and medical restrictions to complete a labor market survey. Tr at 1330, 1396. She testified that she looked up "barge foreman" in the DOT to learn the job duties and make certain assumptions about his experience and abilities, but she did not confirm with Claimant whether his actual work fit that job description. Tr at 1397-1401. She also conceded that she was not aware of his penmanship or ability to spell, but she believes penmanship is irrelevant. Tr at 1400-02. Ms. Gill conceded that she did not disclose Claimant's age to any of the employers on her labor market survey or discuss the fact that he wears a splint, because she was not aware that he uses a splint. Tr at 1373-75. Ms. Gill testified that she no longer had her notes from contacting the employers listed on the labor market survey because she shreds them after writing the report. Tr at 1386-88. Ms. Gill testified that she believes Mr. Stauber "provides a fair evaluation of whoever he interviews and evaluates" but that Ms. Friedman is not certified by the U.S. Department of Labor. Tr at 1371-72, 1377-78. There was testimony about inconsistencies in Ms. Gill's hourly rate for depositions. Tr at 1378-94, 1402-03.

Sharon Friedman testified at the hearing as Claimant's vocational expert. Tr at 881; CX 5. Claimant also submitted a copy of Ms. Friedman's deposition testimony. CX 31. She has been a vocational rehabilitation counselor for 23 years. Tr at 881-82. She has a Master's degree in counseling and various credentials and certifications. Tr at 884-901. She spends approximately 20 percent of her time doing litigation/expert work and 80 percent of her time "meeting with clients, talking with employers, developing plans toward return to work." Tr at 883. She testified that she has done at least 15 to 20 labor market surveys for Longshore cases, and has worked for both employers and claimants. Tr at 956. She met extensively with Claimant in June 2005 to evaluate his background, transferable skills, and physical limitations, and to do vocational testing. Tr at 902-03, 905, 1120. Ms. Friedman testified that doing a face-to-face interview is "critically important" in doing a vocational evaluation to see how the individual presents himself, especially in light of his disability and communication skills. Tr at 905-07. She also reviewed many of the medical records, reports, and restrictions. Tr at 960-64. She noted that Claimant could not spell and had no computer skills. Tr at 1125. Ms. Friedman opined generally, "I do not believe that [Claimant] is qualified to do any of the jobs that are outlined in the labor market surveys that I reviewed." Tr at 902, 947. She testified, "I have not been able to find any jobs that he could do," but conceded that she has not looked for jobs for him. Tr at 1128.

Dr. Gillick testified that he reviewed the labor market surveys and based on his knowledge of those jobs, and of Claimant's abilities, he opined that Claimant "is incapable of competing for, obtaining, and retaining any of the jobs listed." Tr at 469.

Dr. London testified that he did not believe he had formally reviewed or approved the jobs listed on Mr. Stauber's labor market survey. Tr at 708. After briefly reviewing the jobs, Dr. London opined that "they would fit the job restrictions that I had recommended on a non-industrial basis." Tr at 709. Dr. London agreed that the jobs would be appropriate alternative employment for Claimant. Tr at 709.

Dr. Ohayon opined that Claimant can work in a modified capacity. Tr at 1284. However, she testified that she would defer to a vocational rehabilitation specialist on the issue of whether he could perform a particular job. Tr at 1284.

Labor Market Surveys (LMS) / Vocational Evidence

a. February 23, 2006 LMS by Joyce Gill

In her February 23, 2006 labor market survey, Ms. Gill identified 18 security guard positions and 15 parking lot cashier positions that she believed Claimant could obtain and perform. KX 5 at 54-68; Tr at 1355, 1372-73. In her labor market survey, Ms. Gill titled these positions "merchant patroller" and "cashier II" based on the Dictionary of Occupational Titles. Tr at 1331-32. Within these two categories of positions, Ms. Gill identified jobs that were available in March 2002, June 2002, April 2004, February 2005, and February 2006. KX 5 at 54-68; Tr at 1333, 1351. Ms. Gill chose these time periods based on when the different physicians released Claimant, found him permanent and stationary, or gave him restrictions. Tr at 1333, 1337-38. Because I found above that Claimant's upper extremity conditions first

became disabling on June 26, 2002, I will focus on the positions there were available in June 2002. However, since these positions are very similar over time and among employers, most of my findings would also apply to positions that were available on other dates. Similarly, although Ms. Friedman testified that she only attempted to contact the "current" jobs that were available in February 2006, Tr at 918, 1137, 1150; CX 31 at 24-25, I will apply her general comments and concerns about both categories of positions to the jobs that were available in June 2002.

I find that none of the parking lot cashier positions are suitable for Claimant's upper extremity restrictions. Ms. Gill opined that Claimant would be capable of performing these positions. Tr at 1350, 1355-56. For nearly all of the positions, Ms. Gill noted that the worker is required to "determine charges and accept payment." KX 5 at 63-68. Ms. Gill testified that these positions involve taking tickets from the customer, pressing buttons on the cash register, pulling money out of the cash register, counting change. Tr at 1353-54. These tasks necessarily require grasping and taking the parking ticket from the customer, handling the ticket to determine the charge owed, grasping the money or credit card tendered for payment, using the hands to work the cash register or credit card machine, and gripping the customer's change or receipt. As Ms. Friedman noted, a cashier "Must be able to handle a constant flow of money back and forth, which involves gripping and grasping, as well as reaching." Tr at 920; CX 29 at 550. This is also consistent with the testimony of Mr. Johnson, who only identified security guard jobs in his two labor market surveys, "I had eliminated a lot of jobs that are light or sedentary that would have been paper processing jobs or cashiering jobs where he would have been continually pinching or manipulating with his fingers . . . ." GX 24 at 800.

I find that Claimant could not perform such work within his restrictions. This conclusion is unchanged by the fact that for each position, Ms. Gill noted, "There is no lifting or carrying, forceful gripping, pushing or pulling." KX 5 at 63-68. Even though these jobs do not require any forceful gripping, they do involve repetitive grasping, which violates Claimant's upper extremity restrictions. I also note that Ms. Friedman opined that these cashier positions were not suitable because customer service is a primary aspect, and Claimant has no customer service experience and does not have the temperament for dealing with the public. Tr at 919-20.

In addition, Claimant testified that he did not believe he would be able to perform a cashier position. Tr at 863. He testified that he could only punch numbers on a cash register with one hand. Tr at 848. He does not believe he could be a parking cashier because a lot of the positions require use of a computer. Tr at 367. Claimant conceded that he could operate a cash register but he was only familiar with older styles, not the new computerized ones. Tr at 392-93. He stated, "I could probably learn. But I'm used to doing nothing but construction work." Tr at 393. Claimant was also concerned that some positions require standing and working out of an apron, or walking back and forth, which he cannot do because he gets fatigued and out of breath, and there are no sitting positions. Tr at 367.

For all of these reasons, I find that none of the cashier positions from Ms. Gill's February 23, 2006 labor market survey constitute suitable alternative employment.

I find that the security guard positions are suitable for Claimant's work-related physical restrictions. The three employers with positions available in June 2002 were Pinkerton Security, Knight Security, and Burns Security. KX 5 at 58-59. Ms. Gill opined that Claimant would be capable of performing these positions. Tr at 1346, 1355-56. As with the cashier positions, Ms. Gill noted for each position, "There is no forceful gripping, pushing, pulling, lifting, or carrying." KX 5 at 58-59. Although Claimant's actual upper extremity restrictions are more limiting, unlike cashier work, there is nothing inherent in security guard work that requires much gripping, grasping, lifting, or handling of materials. Thus, I find that the security guard positions could be performed within Claimant's upper extremity restrictions.

Claimant argued, through the opinions of Ms. Friedman and his own testimony, that he would not be able to obtain or perform a security guard position due to his sedentary work restriction, his hearing loss, and the fact that he does not have a high school diploma or a guard card. However, I find that these arguments fail and Claimant did not successfully rebut the suitability of the security guard positions as alternative employment.

First, Ms. Friedman's main concern about the security guard positions is that there are very few, if any, positions that are sedentary and most positions require standing and walking throughout the shift. CX 29a at 548-550; CX 31 at 5-7, 23; Tr at 909, 912, 1138-41, 1146-48, 1151-53. However, she conceded that Claimant was not restricted to sedentary work until 2004 and thus it's possible he could have done these jobs in 2002. Tr at 1154-55. Ms. Friedman also expressed concern that Claimant would not be able to move quickly and respond in case of emergency. CX 29a at 548-50. However, I find that these concerns and the restriction to sedentary work are related to Claimant's heart condition, which I found to be not work related. As discussed above, because Claimant's heart condition is not work related, any restrictions related to that condition should not be considered in evaluating suitable alternative employment. I find, however, that even taking into account Claimant's restrictions based on his heart condition, at least one of the security guard positions available in June 2002 would be suitable. The position with Pinkerton states that "Posts are available that require hourly rounds of property . . . . Most rounds take from 15-30 minutes to complete. Worker can be seated between rounds." KX 5 at 58-59. The position with Knight states, "Worker will be seated approximately 95% of shift." KX 5 at 59. The position with Burns states, "Employer makes every effort to accommodate workers with restrictions. Work will be assigned to posts that permit sitting for at least half his shift." KX 5 at 59. I find that at least the position with Knight would constitute sedentary employment and could be performed within Claimant's restrictions based on his non-work-related heart condition.

Second, Ms. Friedman was also concerned that Claimant's hearing loss would limit his ability to perform the security guard position. She stated, "[Claimant] is not capable of communicating via telephone or radio transmitter with a history of poor word discrimination." CX 29a at 550. She also testified that "Hearing loss of any kind would be a problem, mainly because sometimes you are listening to somebody and listening to the walkie-talkie at the very same time." Tr at 911-13, 1144. Ms. Friedman also expressed concerns that Claimant's hearing loss would make him unable to hear suspicious noises, which is part of the basic duty of "observe and report." Tr at 913, 917; CX 29a at 548, 550. She also testified that the contact at Sony told her that hearing loss in one ear "probably would be a concern" but that "some hearing

loss wouldn't necessarily be a problem, especially if it was corrected." Tr at 1144. I find that Ms. Friedman's concerns are exaggerated. Claimant was able to use a walkie-talkie effectively during his employment, even in the presence of loud noises, and there is no evidence to suggest that his hearing loss has increased drastically since that time. I also note again that Claimant's hearing loss is in only one ear, and there is no evidence that it could not be corrected through use of a hearing aid.

Third, Ms. Friedman raised concerns that many of the security guard positions require a high school diploma or GED, and many also require a guard card. CX 29a at 548; CX 29b at 617. I first note that none of the descriptions on Ms. Gill's labor market surveys states that the position requires a high school diploma, GED, or a guard card. Ms. Friedman's contacts with the employers from Ms. Gill's labor market survey identified one position that requires a guard card. CX 29b at 617. However, of the 18 security guard positions identified by Ms. Gill, Ms. Friedman only attempted to contact the 3 employers that had current positions available in February 2006. Ms. Friedman did identify 3 out of 11 employers that require a guard card on Mr. Johnson's February 5, 2005 labor market survey, and 4 out of 12 in his June 17, 2005 labor market survey. I also note that Ms. Friedman conceded that some employers will help their employees obtain guard cards. CX 31 at 29. Second, I note that although there was some confusion about whether Claimant has a GED, GX 24 at 80-07; KX 5 at 44, I find that the evidence does support a conclusion that Claimant has a GED. Claimant testified that he attended school through the tenth grade, and then got a GED when he was in the Air Force. Tr at 115, 668. Thus, with regard to the June 2002 jobs from Ms. Gill's labor market survey, Keller has met its burden by demonstrating the availability of suitable employment for which Claimant is qualified, and Claimant has not rebutted that finding with evidence that Claimant is not qualified for the positions.

Lastly, Ms. Friedman also testified that all security guards must "observe and report" and some are specifically required to complete reports in legible handwriting. Tr at 913-17, 1152-53. Ms. Friedman opined that the "observe and report" job requirement would eliminate Claimant from consideration for security guard positions. Tr at 917, 1153. However, most of Ms. Friedman's concerns about the "observe and report" job requirement focused on Claimant's hearing and eyesight limitations. Tr at 913, 1151-52. There was also some general testimony about Claimant having poor handwriting and spelling abilities. Tr at 115, 118, 325-26, 331, 848, 1121-25. Claimant testified that he delegated as much of the paperwork and report writing as possible during his employment, Tr at 118-19, 300, 328, and his mother handles much of his personal paperwork. Tr at 118, 134. The record also includes samples of Claimant's handwriting and spelling. CX 28. I note that Ms. Friedman never specifically opined that Claimant's handwriting or spelling would prevent him from performing the written reporting required by a security guard position. I find that security guards are only required to document whether they have completed their rounds and whether they noticed anything out of the ordinary, such that the amount of writing required is minimal. Therefore, I find that neither Claimant's upper extremity restrictions nor his weak handwriting and spelling would preclude him from obtaining or performing this position.

In addition, Claimant testified that he is incapable of performing the duties of a security guard. Tr at 991. He testified, "With my physical requirements, I wasn't able to ascertain that any of them would hire me." Tr at 995. He testified that "based on what they gave me at the guard place, the physical requirements, I couldn't do it if I had a guard card." Tr at 1001. Claimant also testified that during his interview with Mr. Johnson, Mr. Johnson commented that even he did not think anyone would hire Claimant as a security guard with his hearing loss. Tr at 1007. For reasons discussed above, I believe the security guard positions constitute suitable alternative employment despite Claimant's concerns because his heart condition is not relevant to this determination and his hearing loss could be corrected.

Claimant also submitted evidence of the essential functions, qualifications, and physical requirements for the Allied Barton position. CX 10. He also submitted information from the websites of Heritage Security Services, Millenia, and Guardsmark. CX 11. However, this information fails to rebut the suitability of the security guard positions with Pinkerton, Knight, and Burns that Ms. Gill identified as being available in June 2002.

Lastly, I also find that the suitability of the security guard positions as alternative employment is confirmed by the testimony of Mr. Johnson, who only identified security guard jobs in his two labor market surveys, that "I didn't limit my search to just security, but after a while it became apparent that security was probably the only job that he would be capable of doing, given his age, education, work history, medical status." GX 24 at 801.

Thus, for all of the above reasons, I find that the three security guard positions available in June 2002 constitute suitable alternative employment. The wages for these positions in June 2002 were $7.00-13.00 per hour at Pinkerton Security, $9.00 per hour at Knight Security, and $8.50-10.00 at Burns Security. KX 5 at 66-67. Because Claimant has no experience as a security guard, I find that he would be hired at the low end of the wage ranges provided. Thus, averaging the wages from these three employers, I find that Claimant's earning capacity in June 2002 would have been $8.17 per hour and $326.67 per week based on a 40-hour work week.

b. May 12, 2006 LMS by Howard Stauber

Although I have already found that Claimant had a retained earning capacity of $326.67 per week as of June 2002, it is still necessary to analyze Mr. Stauber's labor market survey to determine whether it demonstrates a greater retained earning capacity since it includes some higher paying positions.

In his May 12, 2006 labor market survey, Mr. Stauber identified 10 positions, which he separated into four groups. GX 29; Tr at 1423. The first group includes cashier positions at Exxon, Washington Mobil, and another Exxon location. The second group includes a scheduler/appointment setter position at New Coat Exteriors and a parts ordering position at Courtesy Chevrolet Center. The third group includes a customer service position at Ace Parking Management, customer service representative at Vanguard Car Rental, and customer service representative at Carl's Rentals. The fourth group includes yard manager at Carl's Rentals, and guard supervisor at Command Guard Services. GX 29. Mr. Stauber opined that Claimant was

capable of performing these jobs and they were appropriate taking into account his age, education, physical limitations, work experience, and geographical area. Tr at 1422-24.

With regard to the first group, for the reasons discussed above with regard to the Gill labor market survey, I find that the three cashier positions (at Exxon, Washington Mobil, and another at Exxon) are not suitable for Claimant's upper extremity restrictions. Mr. Stauber testified that he believed these positions were within Claimant's physical restrictions and abilities. Tr at 1424-30. Mr. Stauber agreed that these three positions had relatively the same requirements. Tr at 1449, 1454. Like the parking cashier positions discussed above, these gas station cashier positions require repeated grasping to accept payments and make change, which would violate Claimant's upper extremity restrictions. In addition, Ms. Friedman also determined in her contacts with these employers that the positions require lifting to restock machines and shelves and to fill ice coolers, cleaning pumps, and sweeping and mopping floors. Tr at 921- 29, 1067-68, 1081, 1088-91. Because Ms. Friedman, Mr. Stauber, and Claimant himself obtained their information about these positions from different sources and contact people, there was some controversy over whether Claimant would be required to perform these tasks. Tr at 1068-72, 1076-81, 1084-87, 1427, 1429, 1449-58, 1486; GX 39. Mr. Stauber testified that he read the job advertisements and discussed the job requirements and qualifications with the employers, but did not obtain formal job descriptions. Tr at 1449-50; GX 39. I find that these tasks would violate Claimant's lifting restrictions and restrictions of limited grasping and no heavy work with his hands. *See* Tr at 1083, 1089-91. However, even if these tasks are not required, I find that the basic tasks of accepting payments and making changes would violate Claimant's restrictions.

In the second group, I find that the scheduler/appointment setter position with New Coat Exteriors is not suitable based on Claimant's upper extremity restrictions or his experience. I find that Claimant's upper extremity restrictions would limit his ability to perform the position, given the amount of writing required. The labor market survey states that "there is no prolonged or continuous handwriting; no forceful or repetitive gripping/grasping; there is no forceful pushing or pulling with either upper extremity . . . ." GX 29 at 1211. However, Ms. Friedman testified that the position requires "excellent writing skills" and "a lot of writing." Tr at 931, 933. She explained, "You need to take notes, they need to pass these notes on to the sales people. So they're writing lead sheets, basically." Tr at 931. Ms. Friedman expressed concern that Claimant's upper extremity problems would limit his ability to write quickly and that the amount of writing would be repetitive, not occasional. Tr at 933, 1099. I note that there was some confusion about whether Ms. Friedman had spoken with the proper contact person about the job. Tr at 1092-95. Mr. Stauber did not rebut these concerns, but testified that it remains his opinion that the job is suitable for Claimant. Tr at 1432. Even if the position does not require "prolonged or continuous handwriting," taking notes for 10-15 calls per hour would still involve repetitive gripping of a pen or pencil. Thus, I find that the amount of writing required by this position would violate Claimant's upper extremity restrictions.

In addition, the scheduler/appointment setter "is responsible for arranging free estimates for roofing, painting, window installations . . . .[and] is expected to complete between 10-15 calls per hour. Requirements include ability to communicate and understand basic verbal instructions." GX 29 at 1211; Tr at 1469. Ms. Friedman expressed concern that "It's a sales job

. . . [and] they require somebody with excellent phone skills . . . who has got a good feel for dealing with all types of people and all types of personalities, somebody who is very fast . . . ." Tr at 930-31. She also testified that it is a "boiler room" working environment, and "it sounds like they're looking for young, quick, hungry people to do this type of job." Tr at 933, 1096. She also noted that the scheduler must be "very sharp, easy to talk to, [with] good comm[unication] skills." CX 29a at 562; Tr at 1096-97. Ms. Friedman opined that Claimant "has no transferable skills in this area and admits to not being very cordial or patient." CX 29a at 551; Tr at 1097. However, Ms. Friedman conceded that Claimant is very polite and can carry on a conversation. Tr at 1097-98. In response, Mr. Stauber conceded that the position has aspects of a "boiler room" atmosphere but he "believed it to be appropriate and an appropriate work environment for [Claimant], regardless of the labeling of the particular work environment." Tr at 1432. Mr. Stauber also testified that, although the scheduler/appointment setter position was available at the time of his labor market survey, the position no longer exists in the same, boiler-room format because appointments are now scheduled by employees at outdoor kiosks and paid solely on commission. Tr at 1464-70; GX 39 at 2. Mr. Stauber did not otherwise rebut Ms. Friedman's concerns. I find that Claimant would not be competitive for this position because he has no sales or telemarketing experience. Although the position does not explicitly require such experience, I find that Claimant would not be able to successfully obtain and perform the job without such experience and that the employer would likely be unwilling to train someone Claimant's age without such experience. *See* Tr at 933-34.

Also in the second group, I find that the parts ordering position with Courtesy Chevrolet Center does not constitute suitable alternative employment. The labor market survey states, "Requirements include ability to communicate and understand basic verbal instruction." GX 29 at 1212. The physical requirements of the position are described as "optional usage of a headset. There is no prolonged sitting or standing; there is no heavy lifting or repeated bending/stooping required; no prolonged or repetitive forceful pushing/pulling with either upper extremity; no frequent, repetitive or forceful gripping/grasping." GX 29 at 1212. Ms. Friedman testified that she was not able to talk to this employer. Tr at 934. Ms. Friedman commented generally that "[Claimant] has a documented hearing loss and would likely have difficulty on the telephone. He has no transferable skills in this area and admits to not being very cordial or patient. No computer skills." CX 29a at 551. Mr. Stauber testified that the position does require use of a computer. Tr at 1475. He testified, "This particular parts ordering position is at . . . the parts department in a car dealership . . . where customers . . . will come to . . . inquire about replacing a part. Or perhaps a mechanic working on the car at the dealer's service bay will come to the parts department to inquire whether indeed a particular part . . . is available." Tr at 1433. He also described that in the position, "there are times when people call in. Customers would call in and ask whether a particular item is available. They are doing this unilaterally without the use of any representatives in the service station. So parts people, my understanding is, also receive telephone calls." Tr at 1475-76.

I find that Claimant's hearing loss would not limit his ability to perform this parts ordering position, because could use the telephone on his right ear or he could have his left ear hearing loss corrected with a hearing aid. However, Ms. Friedman stated that Claimant would not be competitive for the position because he has no computer skills. CX 29a at 551. Claimant testified that he has no experience with computers, does not even know how to turn a computer

on, and would not be able to use a computer to find directions or reserve a rental car. Tr at 135, 847. I find Claimant credible that he cannot use a computer. Mr. Stauber confirmed that the position does require use of a computer. Tr at 1475. However, Mr. Stauber did not provide any information to rebut Claimant's testimony that he could not perform the job due to his lack of computer skills. Mr. Stauber did not state that the employer would provide computer training or that computer skills required were so basic that Claimant could easily learn them. I also note that Keller argued in its closing brief "Claimant obtained a tax benefit when he purchased a computer and used it as a business expense on his taxes in 1996. The Court should not rely as credible Claimant's testimony that he cannot work a computer after receiving the tax benefit of buying a computer and using it as a business expense." ALJX 6 at 25, citing CX 4 at 343-49. I find that the fact the Claimant purchased a computer does not necessarily mean that he can use a computer to the level required by this position. Therefore, for all of the above reasons, I find that Keller failed to rebut Claimant's concerns about the computer use involved in this position and thus, failed to demonstrate that this position constitutes suitable alternative employment.

With regard to the third group, I also find that the three customer service positions at Ace Parking, Vanguard Car Rental, and Carl's Rentals are not suitable for Claimant's upper extremity restrictions. Like the cashier positions, the primary responsibilities include receiving payments or reservation paperwork, calculating charges owed, and making change for customers. Tr at 935-41, 1437, 1476-80. These tasks necessarily require repeated gripping and grasping that exceed Claimant's upper extremity restrictions. In fact, the Ace Parking customer service position is actually a parking cashier job like those in Ms. Gill's labor market survey discussed above, and required taking tickets, accepting payment, and making change at a potentially fast pace. Tr at 935-36, 1114-16. According to Ms. Friedman, these positions also often require driving cars or moving equipment around throughout the day. CX 29b at 552, 563; Tr at 936, 938. Since driving requires firmly grasping the steering wheel, and sometimes the gear shift, I find that this task would also exceed Claimant's upper extremity restrictions. In addition, the position at Vanguard requires sales/customer service and computer skills that Claimant does not have. Tr at 937-39. Similarly, the position at Carl's Rentals requires experience or background in equipment repair that Claimant does not have. Tr at 940. Ms. Friedman conceded that she did not speak to the same contact person at Ace Parking as Mr. Stauber. Tr at 1112-13.

In the fourth group, I find that the yard manager position with Carl's Rentals is not suitable. The labor market survey states that the position involves "no repetitive heavy lifting, carrying or forceful pushing/pulling with either extremity . . . ." GX 29 at 1213. However, Ms. Friedman stated that the position requires lifting up to 60-90 pounds. CX 29a at 552. She stated that "No employee just supervises," and the yard manager must be able to do all of the duties of the yard workers/customer service representatives. CX 29a at 562. She testified that the yard manager position is "as physically demanding" as the customer service position. Tr at 1108. The employee must be able to "life and move equipment as it is rented and returned," CX 29a at 552, Tr at 941, and must also be able to fix and repair the equipment. Tr at 941, 1104-05. Mr. Stauber testified that the yard manager position differed from the customer service position in that it involved more supervisory skills. Tr at 1437. Mr. Stauber testified that he believed it was an appropriate position, but he did not rebut Ms. Friedman's concerns. Tr at 1437-38. Thus, I find that the heavy lifting of equipment would violate Claimant's upper extremity restrictions, making this position unsuitable. Ms. Friedman also indicated that the position requires the

ability to fix equipment and prior experience in the rental industry, which Claimant does not have. Tr at 1104-06. Ms. Friedman conceded that the description of the position that she obtained was different from that obtained by Mr. Stauber, but she asserted that her information should be credited because it was obtained directly from Carl, the owner and contact. Tr at 1107.

Also in the fourth group, I find that the guard supervisor position with Command Guard Services is not suitable. The labor market survey states that the employee "collects paperwork at sites, schedules personnel; and related supervisory duties. Ability to communicate; familiar with light maintenance." GX 29 at 1213. Ms. Friedman noted that the employee must "go out to each site, write reports, cover any shift if needed; driving/towing exp[erience] + exp[erience] in guard field, hook up and tow trailers from site to site." CX 29b at 563. Ms. Friedman testified, "They operate out of trailers, sometimes on construction sites. And it's the responsibility of the supervisor, not the guard, to move the trailers if they need to be moved. So they would actually have to hook up a trailer to their truck and tow it, if that was necessary. And that would, of course, involve forceful gripping, grasping, very physical heavy work." Tr at 944, 1109. Ms. Friedman conceded that he would not be required to actually lift the trailer and also conceded that she did not know what tools would be required. Tr at 1110. Mr. Stauber conceded that the employees are responsible for movement of the trailer equipment but he testified that the contact "indicated that a supervisor, if they were unable to safely and comfortably engage in that aspect of the job, which was a small percentage of it, that they would delegate that responsibility to someone who could do it." Tr at 1482-83. He conceded that he did not discuss movement of trailers or delegating that responsibility in his labor market survey. Tr at 1484. Thus, I find that Mr. Stauber rebutted Ms. Friedman's concerns about moving the trailers. However, Mr. Stauber did not rebut the requirement that the employee have guard experience. I find that it is very likely that an employer would require a guard supervisor to have some guard experience, especially when he is to be paid $12-13 per hour as compared to the $8-9 per hour that guards are paid. Thus, I find that Claimant does not have the experience necessary to compete for and obtain this position, and therefore it is not suitable.

For all of the above reasons, I find that none of the positions on Mr. Stauber's labor market survey constitutes suitable alternative employment. Therefore, Claimant's retained earning capacity remains at $8.17 per hour and $326.67 per week from June 2002 forward.

c. February 5, 2005 and June 17, 2005 LMS by Paul Johnson

Global's vocational expert, Paul Johnson, conducted labor market surveys on February 5, 2005 and June 17, 2005. GX 17. Mr. Johnson identified 11 security guard positions in his February 5, 2005 LMS, and 12 security guard positions in his June 17, 2005 LMS. GX 17. Mr. Johnson explained that he issued two labor market surveys "to demonstrate that the jobs that were available in January and February [2005] have remained available through February, March, April, May and June [2005]." GX 24 at 802, 830, 838.

I find it unnecessary to consider Mr. Johnson's labor market surveys because I have already found that Claimant has a retained earning capacity of $326.67 per week as of June 2002 based on Ms. Gill's labor market survey, and Mr. Johnson's labor market surveys do not establish a greater earning capacity or a retained earning capacity that begins earlier in time. The

positions on Mr. Johnson's February 5, 2005 labor market survey have an average wage of $8.07 per hour and $322.73 per week. Similarly, the positions on Mr. Johnson's June 17, 2005 labor market survey have an average wage of $8.04 per hour and $321.67 per week. Moreover, although it is not completely clear from Mr. Johnson's labor market survey, it appears that these wages are in 2005 dollars and would be even lower if adjusted for inflation to 2002 dollars.

If it were necessary to consider Mr. Johnson's labor market surveys, I find that they do not meet the burden of demonstrating the availability of suitable alternative employment.

Mr. Johnson testified that he contacted many employers and only included in his labor market survey those positions that fit Claimant's age, education, work history, and medical status. GX 17. He testified, "based on my experience at reading these ads, I only call the employers that I think will respond affirmatively, and I've learned to read them fairly effectively." GX 24 at 803. Mr. Johnson only included in his labor market survey those jobs that fit Claimant's restrictions and qualifications after speaking with the employers about the jobs. GX 24 at 807, 809, 813-14. Mr. Johnson explained what he told the prospective employers about Claimant. GX 24 at 820-21. He also asked about their typical applicant/employee pool. GX 24 at 823-24. Mr. Johnson testified that he did not make any separate notes about his contacts with the employer, and any notes would be on the printouts from CalJobs and the San Diego Union-Tribune/Sign-on San Diego. GX 24 at 791, 803-04. However, these exhibits do not include any notes. He also testified that he did not list all of the contact people for each employer because they will not always provide their name, and he was not sure that the people he spoke with were in charge of hiring. GX 24 at 818-19, 824-26.

Despite Mr. Johnson's testimony that he contacted each employer listed on his labor market survey, both labor market surveys included the same, exact description of the duties and requirements for each position. This description appears to be copied, at least in part, from a general description of security guard work. *See* CX 8. I do not find it credible that every position identified requires exactly these same duties, responsibilities, and physical abilities. *See* Tr at 911. Mr. Johnson testified that the jobs descriptions are based upon "Partially what that employer told me, partially what other employers tell me and partially what appeared in the ads in the paper; combination of all of those things." GX 24 at 815. He added, "in putting this thing together, I'm sure I referenced the DOT code for unarmed security guard." GX 24 at 815. He explained that he updates the description periodically based on changes in the industry. GX 24 at 816. However, he denied that the description was generated prior to working on Claimant's case, and asserted that it includes things he learned in contacting the employers on the LMS and that the line at the end with Claimant's name in it is different. GX 24 at 817-18. Mr. Johnson asserted that the description is identical because "The job is the same wherever you go. Those are the range of duties that exist at the employers in San Diego . . . . They're all looking for the same kind of people to do the same kinds of things." GX 24 at 818. However, he later testified, "They're looking for the same duties to be performed. Some of them have higher qualifications for lifting capacity, some have higher educational requirements. You know, there are differences between the companies." GX 24 at 823.

This raises questions about whether Mr. Johnson actually contacted these employers and investigated "the precise nature, terms, and actual availability of these positions." *See Thompson*

v. Lockheed Shipbuilding & Construction Co., 21 BRBS 94, 97 (1998). I note that vocational experts must identify specific available positions; general labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). In her contacts with the employers listed, Ms. Friedman found that the requirements and duties differed from the generic descriptions. Tr at 911-17.

In addition, as part of his generic descriptions of each position, Mr. Johnson stated, "When advised of [Claimant's] age, education, work history and medical status, this employer stated that should [Claimant] apply for a position, he would likely be interviewed." GX 17. Mr. Johnson testified that "None of [the employers] were willing to commit to hiring such an individual without actually being able to see him." GX 24 at 840, 843. Even if I found it credible that Mr. Johnson did have such a conversation with each potential employer, I find that the fact that Claimant would likely be interviewed is insufficient to meet the burden of demonstrating Claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp*., 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State Inc.*, 31 BRBS 118 (1997). For these reasons, I find that that Mr. Johnson's labor market surveys are insufficient to meet the burden of establishing the existence of specific jobs that Claimant could perform and obtain. *See Bumble Bee*, 629 F.2d at 1327-30; *Hairston v. Todd Shipyards Corp.*, 849 F.2d at 1196.

iv. Claimant's Willingness to Work and Search for Employment

As stated above, once the employer has met its burden of demonstrating the availability of suitable alternative employment, the burden shifts to the claimant to establish total disability by showing that he is willing to work and diligently sought appropriate employment but has been unable to secure it. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987).

Claimant's Testimony Regarding His Willingness to Work and Search for Employment

Claimant did not attempt to visit employers that were listed as having jobs available in 2002 because he assumed that they did not have current openings. Tr at 849, 856-57. Thus, Claimant did not attempt to obtain any of the positions found to constitute suitable alternative employment.

On Ms. Gill's labor market survey, Claimant went to Central Parking but could not find the employer at the address given. Tr at 846; CX 28 at 541. At Ace Parking,[7] he filled out an application, took a math test, and was interviewed by Ms. Arissa. Tr at 840-43, 859, 861-62. He was told that they only had part-time jobs available but he could be on-call for event work that involved standing and working out of an apron. Tr at 843-44, 859; CX 28 at 542. Claimant did not request to be on the list for on-call work. Tr at 845. Claimant testified that Ms. Arissa asked about his hand and when he told her about it, she said, "Well, I don't believe you could do this, because the only on-call work we have is very fast paced and you're standing in a parking lot all day and working out of an apron." Tr at 863. Claimant did not attempt to visit Sunset Parking because it was located in Cardiff, which he believed would take too long and cost too much in

[7] This employer was listed on more than one labor market survey.

gas money to get to from his home. Tr at 845, 848-49, 855-56; CX 28 at 542. At Ampco, the contact person had not worked there for six months and they had no current openings, but Claimant left an application. Tr at 845-46, 860; CX 28 at 543. At Lindberg Parking, Claimant spoke with the Human Resources person, who "said that I would have to use both hands and count money, and to be able to use a computer – which I could do neither." Tr at 846-47; CX 28 at 543. At Five-Star Parking, Claimant spoke with the contact person. Tr at 850, 858. Claimant did not visit Security Defense or Allied Barton on the attachment to Ms. Gill's labor market survey because he was not given the attachment. Tr at 1000; CX 28. However, based on his inquiries with similar employers, Claimant believed these employers would have had similar requirements that he would not have met. Tr at 1000. The Security Defense job would require driving to Rialto, two-and-a-half hours away, for an interview. Tr at 1032. Claimant did not try to contact Sony Electronics. Tr at 1032.

On Mr. Stauber's labor market survey, Claimant testified that in May 2006 he visited all of the employers, except for those he could not find due to incorrect addresses. Tr at 384, 399. He filled out applications at some of the employers, but not at every employer because some of the jobs were no longer available. Tr at 385-86. None of the employers offered him a job. Tr at 386. At the first Exxon, he spoke to Marco, the contact person, who stated that the job required lifting, stocking the shelves, cleaning the pumps, and running the cash register. Tr at 391; CX 28 at 527. Claimant testified that Marco asked if he could lift with his splint on and when Claimant said he did not think he could, Marco told him he would not be suited for the job. Tr at 391-94. At Washington Mobil, Claimant spoke to the manager, who told him the position was no longer open. Tr at 394-95; CX 28 at 527. At the second Exxon location, the contact person was not there, so Claimant spoke to the cashier, who told him the job required stocking shelves, cleaning, and lifting 50 pounds. Tr at 395-97; CX 28 at 528. At New Coat Exteriors, the contact person was not there, but Claimant found out the position was now commission only and filled out an application. Tr at 397-98; CX 28 at 528. At Courtesy Chevrolet, Claimant spoke with the contact person, and found out the position had been filled. Tr at 400-01; CX 28 at 528. At Ace Parking, Claimant filled out an application, took a math test, and had an interview. Tr at 401-03. However, he was told that they only had part-time jobs that involved standing and working out of an apron at an event, which Claimant did not believe he could do due to his hands and the standing. Tr at 403-04. At Vanguard Car Rental, Claimant spoke to the contact person, who told him the position had been filled. Tr at 869; CX 28 at 529. Claimant testified, "I asked her, . . . 'Well, if there was a job opening, what would the job require me to do? Would it require me to use a computer?' And she said, 'Yes, you have to enter all this on the computer.' I said, 'Well, that leaves me out, because I don't know nothing about a computer.'" Tr at 869-70. Claimant testified that he did not ask whether the employer would train him to use a computer. Tr at 870. At Carl's Rentals, Claimant went once to get an application and a second time to drop off his application, but the contact person was not there either time. Tr at 871; CX 28 at 530. Claimant testified, "I stood around there and watched what he had to do, and he was renting them trucks and things, so he would have to . . . load[] dollies and different things up in the trucks for the customers before they left. And I knew right then it was something that I wouldn't be able to do." Tr at 871. At Command Guard Services, Claimant was told that the guard supervisor job had been taken. CX 28 at 530.

On Mr. Johnson's labor market survey, Claimant testified that he visited every employer, except for some that he could not find due to incorrect addresses and one that was too far. Tr at 380, 991-92. However, Claimant had lost his notes on these jobs so he was not able to recall many details about the contacts or interviews. Tr at 382-83, 992-95. He testified that he filled out applications, but some employers would not give him an application because he could not meet the physical requirements or he did not have a guard card. Tr at 381-82, 996. Specifically, he recalled that one employer had "physical requirements like climbing ladders, carrying 40 pounds, or whatever. And when I said that I didn't believe I could do that, they wouldn't even give me an application." Tr at 995. None of the employers offered him a job. Tr at 383. Claimant testified specifically that at Universal Protection, the employer would not even give him an application because he did not have a guard card. Tr at 994.

Claimant testified that he has not looked for any employment besides following up on the jobs listed on the labor market surveys. Tr at 666-67, 831-32, 854. Claimant testified that he has not made a resume in the last six to eight years. Tr at 665, 1494-95. Claimant also testified that he had not attempted to get a guard card. Tr at 1001. Claimant testified that he does not believe there are any jobs he is capable of performing. Tr at 366.

Claimant explained that he has not sought work "[b]ecause I feel like an idiot working with these papers, asking people to hire me when I know I can't do the job in the first place. I feel stupid. Why . . . send me to ask a person for a job when I know I can't do it? It's degrading me in the first place, I feel that I look stupid in front of these people and wasting their time." Tr at 666-67. Claimant also testified, "I know my limitations better that anybody. I've never used a computer, I don't even know how to turn one on. With my hand in a cast . . . it's already how many years since they operated on it, but it's still not any use. I know my limitations. I think it's ridiculous to go to these jobs knowing that I can't do them in the first place and look like an idiot walking in there. I'm wasting their time and mine . . . . I had this discussion with my attorney." Tr at 847. Claimant testified, "I'm out here doing the survey just because it's required of me. I know that I can't do these jobs, and I feel like a fool going up and asking for them. But I did make an effort, anyway." Tr at 863. When asked if he had any desire to work, Claimant testified, "That depends on the upcoming medical, whether I can work. I know my body better than anybody else. And right now I feel that there's no job that I can do." Tr at 1495.

When asked if he would take a minimum wage job that he could do physically, Claimant answered, "It depends on the job, and the requirements." Tr at 1002. When told that a minimum wage job would pay approximately $13,000 per year, Claimant testified that he would have to look at the job "[t]o see if it was really a job that I'd enjoy doing, or was capable of doing. For that amount of money, would it be feasible that I'd take something like that? There's a lot of things to take into consideration. What are the hours? How long would it require me to be away from home . . . . I have a 21-year old daughter that I like to spend time with, because I haven't been there all of her life . . . so my home time is valuable to me. So there's a lot of things to take into consideration, to take a job that isn't going to pay anything." Tr at 1003.

When asked if he thought a position like parking cashier was beneath him, given his employment history of overseas work and supervising crews of 120 to 180 men, Claimant testified, "Do I believe it's beneath me? No. . . . I could probably do anything. Would I like to

do it? No. If it was related to construction where I'm not in the public's eye, I'd be more apt to take it . . . . I'm used to being out at sea doing a job, not working with the public." Tr at 865.

Claimant testified that if one of the employers from the labor market surveys had offered him a job, "I would have considered it. But right now I probably wouldn't because of all my doctors' appointments . . . Some weeks I have three to four different doctors' appointments in one week. I don't believe any employer would hire me and let me go to a doctor appointment every day and pay me for it." Tr at 851. He testified that when the job applications asked when he would be available for work, he stated August 1st or 15th "because I don't know how long it's going to take me to recover from this eye surgery that's coming up." Tr at 851. He also testified, "I don't believe they'd hire me . . . with my schedule right now." Tr at 865-66.

Claimant testified that he never had to look for work in his career because employers always called to offer him work and he sometimes had multiple offers. Tr at 832. However, Claimant testified that he has not had any offers of work since March 2002. Tr at 854. Claimant testified, "My day-to-day activity is watching a lot of TV. That's about all I do." Tr at 134. In addition, Claimant indicated to Dr. London on May 12, 2006 that he is retired. GX 31 at 1230; Tr at 700. Claimant testified that he has been receiving Social Security, long-term disability, and sold some stock, which has enabled him to pay his bills. Tr at 829-31.

Claimant testified that he did not do anything intentionally to undermine his ability to get a job with any employer. Tr at 381-82. 386, 1494. However, he testified that on applications that asked the reason for leaving his last job, he sometimes noted that he left because of a heart attack. Tr at 382. Claimant also testified that he always wore his splint and when employers asked him about his arm, he told them about his operations. Tr at 1492-93. He testified that some of the employers asked if he could use a computer. Tr at 851. Claimant also testified that if employers asked him where he got the labor market survey or who sent him there, he answered their questions honestly. Tr at 866. He explained that the conversations usually went as follows: "'Where did I get the survey?' 'I got it from my attorney.' 'What do you mean?' 'Well, I'm in litigation. These people say I'm capable of doing this job, and I'm saying I'm not. I want your opinion: Would you hire me?' That's after the fact that we had already established whether I was going to go to work for them or not. Usually not before. But if they asked me a question, I answered their question honestly . . . ." Tr at 866.

Claimant testified specifically that at Lindbergh Parking, the Human Resources person asked him, "'Where did you get this information?' . . . I said, 'My attorney gave me this. We're in litigation. I'm here to find out if I'm employable.' I did say that, but that was after . . . I knew I wasn't going to take the job, there was no job there for me. I had to use a computer and everything, and I told her, 'Ma'am I don't know how to use a computer.' So I think that would be about the end of the conversation . . . . She asked about my arm, I told her I had three operations. And it came up that way. It's not that I went there trying to derail the whole thing… [b]ut yes, I did talk to her about that and say I was in litigation and my lawyer had gave me those papers." Tr at 1492. He testified that he did not tell any other employers about his litigation, that his attorney had sent him, or that his injuries were work related. Tr at 1493-94.

Vocational Experts' Testimony Regarding Claimant's Willingness to Work and Search for Employment

Ms. Friedman testified that she had never seen any indication of Claimant being deceptive, not giving full effort, or not being forthright and straightforward. Tr at 904-05. Mr. Stauber also testified that he had not seen anything to suggest that Claimant has been less than honest or straightforward with regard to his physical condition and abilities in this case. Tr at 1448. On the other hand, Mr. Johnson testified that he found Claimant to be "relatively" straightforward, but he had some concerns. GX 24 at 841. First, he explained, "I showed up and [Claimant's] mother was there. In 25 years of career counseling, I don't think I've ever attended a meeting with a client at an attorney's office where the gentleman was himself 68 years old and his mother had driven him to the appointment." GX 24 at 841. Second, he explained, "I was told that he had a psychological condition, something to the effect that he had a hard time remembering where he was and what he was doing. I didn't find him to have that type of difficulty in responding to my interview questions." GX 24 at 841. Third, Mr. Johnson felt Claimant was less than candid and straightforward because Claimant told him he had dropped out of school in 10th grade, but some of his records stated that he had a GED. GX 24 at 842. In conclusion, Mr. Johnson stated, "I detected some pink flags, not red flags, regarding the information I was being provided." GX 24 at 841.

Ms. Friedman spoke with Claimant after his visits to the employers and also read his notes. Tr at 1126-27; CX 29a at 558-60. After speaking with him she noted that Claimant "feels that none of his skills transfer to any of the outlying occupations." Tr at 1127; CX 29a at 558. Ms. Friedman testified she did not coach Claimant on finding jobs, and she did not know why he did not look for work earlier or what salary he was willing to accept. Tr at 1156-57; CX 31 at 17, 19-20. Ms. Friedman agreed that it would not be recommended or helpful for Claimant to introduce himself to potential employers by explaining that his lawyer sent him and he has a worker's comp case. Tr at 1065-66.

Ms. Gill testified that between June 16 and June 19, 2006 she contacted the employers from her labor market survey that had positions available in February 2006 to determine if Claimant visited or applied to any of them. Tr at 1346-49. She testified that none of the employers recalled or had records or Claimant contacting them or applying for a position. Tr at 1348-49. Ms. Gill testified that she contacted Central Parking, which Claimant claimed to have visited on May 17, 2006 and discovered they had moved. Tr at 1356. Ms. Gill learned that the address was correct in February 2006 when she did the labor market survey, but the employer moved in late March; she also learned that the telephone number had stayed the same. Tr at 1356-57. Ms. Gill also contacted Five Star Parking and spoke with Ken Camera, who told her Claimant had not filled out a job application. Tr at 1362-64. Ms. Gill also contacted Sunset Parking and found out they had positions available in February 2005 working in a booth. Tr at 1364-65. Ms. Gill contacted Ampco Parking and determined that Claimant had met with the manager and completed an application. Tr at 1366.

Ms. Gill also contacted Ace Parking and learned that, although the address listed on the LMS was the address of the worksite/lot, Claimant did go to the Human Resources office, completed an application, and spoke to Arissa about a job. Tr at 1357-58. Ms. Gill testified that

Arissa told her that the only position available on May 17, 2006 when Claimant visited was a Traffic Director-Cashier position that required greater standing and walking than the position on the labor market survey. Tr at 1358. Ms. Gill testified that Arissa told her that Claimant said "he couldn't stand and walk. And she advised him that jobs come up all the time, that positions become available often. And she said that he told her he wasn't particularly interested in returning to work . . . . So that she didn't have to bother calling him." Tr at 1358-59.

Ms. Gill testified, "At Lindbergh Parking I contacted Human Resources and spoke with Estelle Stryker, who indicated that [Claimant] had gone into their facility to complete an application, and told her that he was involved in a workers' compensation case, and his attorney had directed him to go to that employer from the labor market survey." Tr at 1366. Ms. Gill added, "He told her he didn't think he could do the job, and he did not complete an application." Tr at 1367. Ms. Gill testified that she had identified an available job at Lindbergh in April 2004, and she did not know if there was a job available on May 25, 2006 when Claimant went there. Tr at 1367. Ms. Gill testified that she was not aware of any other comments Claimant made to any employers. Tr at 1367. Ms. Gill testified that "generally it's not a good idea to mention litigation to a potential employer." Tr at 1368.

Mr. Stauber also followed up with the employers that Claimant contacted. Tr at 1448; GX 39. Mr. Stauber determined that most of the positions had been filled, and the employers did not recall interviewing Claimant. GX 39. Mr. Stauber agreed that when Claimant visited the Exxon station in Rancho Penasquitos, the physical requirements he was given were more rigorous than indicated on the labor market survey. Tr at 1454-57. Mr. Stauber stated that he would not advise to Claimant to tell a prospective employer that his lawyer sent him to inquire about the job and he has a worker's compensation claim. Tr at 1426. However, Mr. Stauber agreed that in his contacts with the employers, there was no evidence that Claimant had made any such comments. Tr at 1458-59.

Analysis of Claimant's Willingness to Work and Search for Employment

Even though I find Claimant generally credible about his visits to the employers on the labor market survey, I nevertheless find that he did not meet his burden of showing that he is willing to work and conducted a diligent search for employment. While Claimant visited almost all of the employers, filled out applications, and participated in interviews, I find that he was not actually seeking employment or willing to work. Although I decline to find that Claimant was being dishonest or intentionally undermining his chances with these employers, I find that he was not doing anything to improve his chances since he disqualified himself from consideration as soon as a physical requirement or job duty came up that he felt he could not meet or perform. For example, I find that a person who was diligently searching for employment would have told employers that he was willing to be trained to use a computer and was a quick learner, rather than stating that he could not do the job because he did not know how to use a computer.

In addition, the fact that Claimant did not complete a resume or conduct any independent job search also demonstrates that he was not diligently searching for employment. Furthermore, Claimant conceded that he probably would not have accepted a position if it had been offered to him because of his numerous medical appointments and other limitations. He also conceded that

he might not have accepted a low-paying position because he values his time at home with his family, and that he is not interested in any positions in the public eye, or that are very different from his former employment. All of this evidence supports the conclusion that Claimant is not willing to work.

For the above reasons, I find that Claimant has not demonstrated that he is willing to work or that he conducted a diligent search for employment. Thus, Claimant has not rebutted Keller's showing of the availability of suitable alternative employment, and I continue to find that Claimant is partially disabled as of June 2002 with a retained earning capacity of $326.67.

B. Extent of Disability Based on Hearing Loss

Claims for hearing loss are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153 (1993). An audiogram that meets the conditions under 20 C.F.R. § 702.441(b)(1)-(3) & (d) constitutes presumptive evidence of the extent of Claimant's hearing loss. First, it must be administered by a licensed or certified audiologist or by a technician under an audiologist's supervision. Second, the audiogram and a report on it must be provided to the employee within 30 days of administration. Third, the audiogram must not be contradicted by another of equal probative value made at the same time. Fourth, the audiometer used must be calibrated according to current American National Standard Specifications. Lastly, the extent of the hearing loss must be measured according to the most currently revised edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides). 33 U.S.C. § 908(c)(13)(C); 20 C.F.R. § 702.441(b)(1)-(3) & (d).

The 2001 audiogram does not meet all of the requirements of the regulations because it does not have an explanatory report and there is no documentation to confirm that it was administered and interpreted by qualified professionals. GX 13 at 252; CX 3 at 154, 320. There is also no evidence in the record of the percentage of hearing loss shown by the 2001 audiogram upon which an award could be based. GX 13 at 252; CX 3 at 154, 320. On the other hand, the 2004 audiogram appears to meet all of the requirements of the regulations, GX 7. The audiogram conducted on April 13, 2004 showed a 39.375 percent hearing loss in the left ear and 0 percent hearing loss in the right ear, which translates to a 6.563 percent binaural hearing loss. GX 7. Therefore, I find that the 2004 audiogram constitutes presumptive evidence of the extent of Claimant's hearing loss.

Since I have determined that the 2004 audiogram constitutes presumptive evidence of the extent of Claimant's hearing loss, the next issue is whether Claimant should be compensated based on his monaural hearing loss or his binaural hearing loss. Claimant asserts that based on the undisputed audiogram, he has a 39.375% hearing loss on the left side, and a 0 percent hearing loss on the right side. ALJX 4 at 64. Although this translates to a binaural hearing loss of 6.563%, Claimant argues that he is entitled to take compensation for the monaural hearing loss of 39.375%. ALJX 4 at 64-65, citing *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014 (2d Cir. 1993); *Baker v. Bethlehem Steel Corp.*, 24 F.3d 632 (4th Cir. 1994). Under section 8(c)(13)(A), the compensation would be calculated based on 39.375 percent of 52 weeks, which

is 20.475 weeks. ALJX 4 at 65. Neither Global nor Keller addressed in their closing briefs the issue of the amount of Claimant's scheduled award for hearing loss. ALJX 5; ALJX 6.

The BRB has held that where the audiogram reflected only a monaural loss and where the monaural values could be converted to a binaural hearing loss, benefits must be based upon such binaural loss, even though such award would result in the payment of lesser benefits to the claimant. *Garner v. Newport News Shipbuilding & Dry Dock Co.* (*Garner II*), 24 BRBS 173, 176 (1991) (en banc) (Decision and Order on Reconsideration), *vacating* 23 BRBS 345 (1990) (*Garner I*). The Second, Fourth, and Fifth Circuits have ruled contrary to the BRB that claimants are entitled to be compensated for loss of hearing in one ear under section 8(c)(13)(A). *Rasmussen v. General Dynamics Corp*., 993 F.2d 1014 (2d Cir. 1992); *Garner v. Newport News Shipbuilding & Dry Dock Co*., 25 BRBS 122 (4th Cir. 1992)(unpublished); *Tanner v. Ingalls Shipbuilding, Inc*., 2 F.3d 143 (5th Cir. 1993). However, the Benefits Review Board has steadfastly held that, outside of those circuits, where there is a loss of hearing in only one ear, the monaural values should be converted to a binaural loss and benefits should be awarded under section 8(c)(13)(B). *Duncan v. Jacksonville Shipyards Inc.*, 30 BRBS 534 (citing *Tanner v. Ingalls Shipbuilding*, 26 BRBS 43 (1992)); *Bullock v. Ingalls Shipbuilding, Inc.*, 28 BRBS 102 (1994), *modifying on recon. en banc* 27 BRBS 90 (1993) (en banc) (Brown and McGranery, JJ., dissenting on other grounds). Because the Ninth Circuit has not ruled on this issue, I am bound by the BRB precedent.

Because Claimant has only a monaural hearing loss, his benefits must be calculated pursuant to under Section 8(c)(13)(B), which provides for two hundred weeks of compensation adjusted for the percentage of binaural hearing loss. Claimant's 39.375 percent hearing loss in the left ear and 0 percent hearing loss in the right ear translates to a 6.563 percent binaural hearing loss. GX 7. Accordingly, I find that Claimant is entitled to 13.126 weeks (200 weeks x 6.563 percent) of compensation for his hearing loss.

8. Average Weekly Wage/Compensation Rate

i. Relevant Dates of Injury

Section 10 requires calculation of a claimant's average weekly wage ("AWW") as of the date of injury. However, Claimant correctly observes that he must be compensated under a separate AWW for his upper extremity conditions and his hearing loss because "date of injury" is defined differently for each type of injury. ALJX 4 at 68-69.

A. Upper Extremity Conditions = June 2002

Claimant argues that regardless of whether his upper extremity conditions are considered occupational diseases or latent cumulative trauma injuries, they should be compensated based on his AWW in mid-2002, which was the time he recognized his injuries and was disabled by them, even if they were caused by earlier work. ALJX 4 at 70. Similarly, Keller argues that Claimant's compensation should be based on his AWW in 2002 because the Ninth Circuit held in *Johnson v. Director, OWCP*, 911 F.2d 247 (1990), that AWW should be based on the time the

injury became manifest and disabling. ALJX 6 at 22. Global argues that Claimant's upper extremity injuries should not be considered occupational diseases. ALJX 8 at 2-4. Global argues that Claimant's AWW should be based upon his earnings in 1998, when he sustained a cumulative trauma injury, rather than 2002, when the injury became manifest and disabling. ALJX 8at 2-4.

In a case involving an occupational disease, the claimant's AWW is to be calculated at the time the claimant becomes aware, or should have been aware, of the relationship between his employment, disease, and disability. 33 U.S.C. § 910(i). I find, pursuant to *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991) and *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), that Claimant's upper extremity conditions are cumulative trauma injuries, not occupational diseases.

In a case involving a latent traumatic injury, the claimant's AWW is to be calculated at the time the disability becomes manifest, rather than at the time of the accident or injury. *Johnson*, 911 F.2d 247. In this case, Claimant's upper extremity conditions became manifest and disabling on June 26, 2002. Thus, the relevant date of injury for calculating Claimant's AWW for compensation of his upper extremity conditions is June 26, 2002 and his earnings from the end of his employment with Global best represent his earning capacity at that time.

B. Hearing Loss = November 1997

Claimant notes that, unlike compensation for his upper extremity conditions, his hearing loss is compensable based on his AWW at the time of his last covered employment. ALJX 4 at 72-74. Similarly, Keller notes that under *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998), Claimant's compensation for his hearing loss should be calculated as of the date of last exposure prior to the determinative audiogram, which means it will either be based on his AWW from Keller in 1997 or his AWW from Global in 2002. ALJX 6 at 21.

The Supreme Court stated that "the date of last exposure--the date upon which the injury is complete--is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss." *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 165 (1993). In *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 961-62 (9th Cir. 1998), the Ninth Circuit similarly held that, for occupational hearing loss claims, the date of last exposure prior to the determinative audiogram should be used for purposes of calculating benefits. The claimant's AWW should be based on his earning capacity at time of the last covered exposure. *See Steevens v. Umpqua River Navigation*, 35 BRBS 129 (BRB).

As discussed above, Keller is Claimant's last covered employer and the determinative audiogram is the 2004 audiogram. Thus, the relevant date of injury for calculating Claimant's AWW for compensation of his hearing loss is when his employment with Keller ended in 1997.

ii. Calculation of AWWs Under Section 10

Section 10 of the Act provides for three methods for determining a claimant's average annual earnings in subsections 10(a), 10(b), and 10(c). Subsection 10(a) applies when an injured

employee worked in the employment in which he was working at the time of the injury for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Section 10(b) applies when the injured worker was not employed the whole of the year immediately preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. Both sections 10(a) and 10(b) require multiplying a claimant's average daily wage by either 300 if he is a six-day worker or 260 if he is a five-day worker. 33 U.S.C. §§ 910(a) and 910(b). When subsection 10(a) or 10(b) "cannot reasonably and fairly be applied" and therefore do not yield an AWW that reflects the claimant's earning capacity at the time of the injury, subsection 10(c) provides the default method for determining the appropriate AWW. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991); *Lobus v. I.T.O. Corp*., 24 BRBS 137, 139 (1990); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987); *Barber v. Tri-State Terminals*, 3 BRBS 244, 249 (1976), *aff'd sub nom. Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979). Section 10(c) also should be applied where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) or (b). *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976), *aff'g and remanding in part* 1 BRBS 159 (1974); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); *Lobus*, 24 BRBS at 140; *Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981). Section 10(c) does not prescribe a fixed formula but requires the judge to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 901(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998). That figure is then divided by 52, pursuant to section 10(d), to arrive at an AWW. 33 U.S.C. § 910.

Claimant asserts that his AWW should be calculated under section 10(c) because he worked seven days a week and there is no evidence of the wages of comparable employees. ALJX 4 at 71-72. Global agrees that Claimants AWW should be calculated under section 10(c) because there is insufficient evidence to determine his AWW under section 10(a) or 10(b). ALJX 5 at 53-54. Keller takes no position on which subsection of section 10 should be used. ALJX 6 at 21-22; ALJX 9.

In this case, Claimant regularly worked seven days a week for Global and often worked seven days a week for Keller. Therefore, sections 10(a) and 10(b) cannot reasonably be applied to determine Claimant's AWWs. Moreover, there is insufficient evidence in the record to apply section 10(b) because no party has presented evidence of the wages of a comparable worker. For these reasons, I find that section 10(c) should be used to calculate Claimant's AWWs.

A. AWW for Upper Extremity Conditions

Claimant asserts that his AWW for his upper extremity conditions should be calculated as the "annual earning capacity [Claimant] would have had as of mid-2002 in the absence of the hand injuries that then became manifest and disabling." ALJX 4 at 71. He asserts that his annual earning capacity in his last year of work (three-quarters of his earnings from 2001 plus his earnings from the first three months of 2002) was $118,114, which yields an AWW of $2,271.42. Claimant also presents alternative calculations, under which his AWW is $1,613.85 and $1,704.92 and $2,2771.42. ALJX 4 at 72. In his reply brief, Claimant proposes an alternate calculation in which his total earnings of $46,474 from 1997 ($110,793), 1998 ($57,700), 1999

($79,754), 2000 ($57,949), 2001 ($88,656), and through March 27, 2002 ($51,622), are divided by the 5.25 years he worked during those years, for an average annual earnings of $85,043 and an AWW of $1,635.44. ALJX 7 at 2.

Since Global argues that Claimant's AWW should be calculated based on the time of the accident causing the injury, it calculates Claimant's 1995-96 AWW as $997.83 and his 1998 AWW as $1,111.35. ALJX 5 at 54; ALJX 8 at 4. Global calculates Claimant's AWW for the 1998-2002 time period to be either $1,364.18 or $1,291.08. ALJX 5 at 53, fn.3; ALJX 8 at 4. However, Global asserts that Claimant's AWW for 2002 is "irrelevant" in light of the ruling that Claimant was a seaman at that time. ALJX 5 at 53. Keller joins in Global's calculation for the 2002 period. ALJX 6 at 21.

Again, the aim under section 10(c) is to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant at the time of the injury. A determination of the claimant's earning capacity must consider his "ability, willingness, and opportunity to work," and "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932); *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 20 (1986).

Here, the evidence shows that Claimant would work for an employer on a project or series of projects and then would be unemployed for a period before being hired by another employer. CX 25 at 513; GX 16 at 358; CX 17 at 450-51. The evidence also shows that even when employed by a given employer, Claimant did not work every week of the year. CX 3 at 231; CX 12 at 420-21; GX 6 at 57. When he worked for Global, he would work 60 or 90 days offshore and would then have 30 days off at home. Tr at 236-38, 339. When he worked for Keller, there was a work shutdown for six to seven weeks. Tr at 298-99.

Thus, because Claimant rarely, if ever, worked 52 consecutive weeks, it is inappropriate to take Claimant's earnings from the last three quarters of 2001 and the first quarter of 2002, because that was a rare period when Claimant worked almost continuously. It is also problematic to use Claimant's earnings from the first quarter of 2002 at all because it is largely speculative how much of the year he would have worked for the full year but for his heart attack and upper extremity injuries. I also note that subsection (c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991); *Tri-State Terminals v. Jesse*, 596 F.2d 752, 756 (7th Cir. 1979); *Anderson v. Todd Shipyards*, 13 BRBS 593, 596 (1981). Thus, I find that the most accurate measure of Claimant's annual earning capacity toward the end of his employment with Global is to average his annual earnings from 2000 and 2001, which were the last two years when he was physically able to work a full year. Thus, averaging his earnings of $57,949 from 2000 with his earnings of $88,656 from 2001, yields an average annual earning capacity of $73,302.50. I find that this accurately represents Claimant's earning capacity because it is reasonably consistent with his average annual earnings over other periods of his career as well: his average annual earnings for the period of 1996-2001 are approximately $73,000 and his average annual earnings for the period of 1998-2001 are approximately $71,000.

Thus, dividing Claimant's annual earning capacity of $73,302.50 by 52 weeks, pursuant to section 10(d), yields an AWW of $1,409.66.

B. AWW for Hearing Loss

As discussed above, the relevant date of injury for compensation of Claimant's hearing loss is the end of his employment for Keller. Keller stipulated that Claimant earned $475 per day while working for Keller. Tr at 16. Claimant argues that dividing his total 1997 earnings of $110,793.22 by the 41 weeks that he worked that year (subtracting 6 weeks for a work shutdown and 5 weeks at the end of the year after the project ended) yields an AWW of $2,702.27. ALJX 4 at 73. On the other hand, Keller states that Claimant earned $475.00 a day working for Keller and worked 7 days a week, which yields an AWW of $3,325.00. ALJX 6 at 21.

Again, the aim under section 10(c) is to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant at the time of the injury. A determination of the claimant's earning capacity must consider his "ability, willingness, and opportunity to work," and "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Marshall*, 56 F.2d at 78; *Jackson*, 12 BRBS at 413; *Mijangos*, 19 BRBS at 20.

Here, the evidence shows that Claimant would work for an employer on a project or series of projects and then would be unemployed for a period before being hired by another employer. CX 25 at 513; GX 16 at 358; CX 17 at 450-51. The evidence also shows that even when employed by a given employer, Claimant did not work every week of the year. CX 3 at 231; CX 12 at 420-21; GX 6 at 57. When he worked for Global, he would work 60 or 90 days offshore and would then have 30 days off at home. Tr at 236-38, 339. When he worked for Keller, there was a work shutdown for six to seven weeks. Tr at 298-99. Thus, I find that dividing Claimant's earnings for 1997 by only 41 weeks, rather than 52 weeks, distorts his earning capacity because it assumes that he would have worked and earned the same amount every week of the year. Keller's approach of multiplying Claimant's daily earnings of $475 per day by seven days a week also distorts his earning capacity because it assumes that he worked seven days a week every week of the year. I also note that section 10 requires determination of Claimant's annual earning capacity and then dividing by 52 weeks to determine his AWW.

The evidence shows that Claimant earned $110,793 working for Keller in 1997. CX 22 at 485. I find that this reasonably represents his annual earning capacity working for Keller during that year. I note that this is consistent with the evidence showing that Claimant earned approximately $40,000 working for Keller from around July 1996 through the end of 1996, which was also about $2,000 per week. CX 4 at 335, 338, 345, 360; GX 21 at 534. I also note that it is more accurate to use Claimant's earnings from 1997, since he received a raise from $375 per day to $475 per day during his employment with Keller. Tr at 185-86. Lastly, I note that the precise calculation of Claimant's AWW for his hearing loss compensation is unimportant, because by almost any possible calculation, his AWW would yield a compensation rate greater than the maximum compensation rate, as discussed below. Thus, dividing $110,793 by 52 weeks yields an AWW of $2,130.64.

iii. Calculation of Compensation Rates

Although Claimant argues that he should be compensated according to the maximum compensation rate for 2007, he concedes that the Board's decision in *Reposky v. Int'l Transportation Services*, 40 BRBS 65 (2006), is binding and requires that, for all classes of disability other than permanent total, the maximum compensation rate is based on the year in which the disability commenced. ALJX 4 at 74. Accordingly, Claimant concedes that under *Reposky*, the maximum compensation rate for his upper extremity conditions, which became disabling in 2002, is $966.08, and the maximum compensation rate for his hearing loss depends on the time of the last covered noise exposure. ALJX 4 at 74. Similarly, Keller asserts that regardless of what time period is used, Claimant's compensation rate is limited to the statutory maximum. ALJX 6 at 21. Keller notes that the maximum compensation rate for November 1997 is $835.74, and for March 2002 is $966.08. ALJX 6 at 21.

I note that, as with the AWW analysis above, Claimant's compensation rates for his upper extremity conditions and his hearing loss must be calculated differently.

A. Compensation Rate for Upper Extremity Conditions

As discussed above with regard to extent of disability, because Claimant's upper extremity conditions have not reached MMI, his temporary disability compensation is calculated as an unscheduled award based on his loss of earning capacity. Under section 8(e), temporary partial disability compensation shall be two-thirds of the difference between the claimant's AWW before the injury and his wage-earning capacity after the injury. Making this calculation based on Claimant's AWW of $1,409.66 and a weekly retained earning capacity of $326.67 yields a compensation rate of $721.99 per week. ($1409.66 – $326.67 = $1082.99; $1082.99 x 2/3 = $721.99) Thus, Claimant's compensation rate for his temporary partial disability due to his upper extremity injuries is $721.99 per week, beginning June 26, 2002. I note, however, that under section 8(e), temporary partial disability benefits are limited to a period of five years.

In addition, I found above that Claimant had two periods of temporary total disability due to his upper extremity injuries. Specifically, I found that Claimant was temporarily totally disabled from September 10, 2002 through November 26, 2002; and from December 8, 2004 through January 19, 2005. Under section 8(b), temporary total disability compensation is calculated as 66 2/3 per centum of the claimant's AWW. Making this calculation based on Claimant's AWW of $1,409.66 yields a compensation rate of $939.77. Thus, Claimant's compensation rate for his temporary total disability due to his upper extremity injuries is $939.77 per week to be paid from September 10, 2002 through November 26, 2002; and from December 8, 2004 through January 19, 2005.

B. Compensation Rate for Hearing Loss

As discussed above with regard to extent of disability, Claimant's hearing loss injury is considered a permanent partial disability and is compensated as a scheduled award based on his percent of hearing loss. Under section 8(c) of the Act, the compensation rate is calculated as 66

2/3 percent of the claimant's AWW. Making this calculation based on Claimant's AWW of $2,130.64 would yield a compensation rate of $1,420.43.

However, under section 6(b) of the Act, a claimant's compensation rate may not exceed 200 percent of the national AWW. 33 U.S.C. 906(b). Under BRB precedent, the applicable maximum rate is the one in effect when the disability commences; this generally is when the injury occurs, but must be determined by the date benefits commence. *Reposky v. Int'l Transportation Services*, 40 BRBS 65 (2006). For hearing loss injuries, the claimant's hearing loss benefits commence on the date of his last covered exposure to injurious noise levels. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 165 (1993); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993); *Jones v. Boise Cascade Corp.*, 39 BRBS 307 (ALJ) (2005).

Claimant's last exposure to injurious noise levels was in November 1997, when he last worked for Keller. The maximum compensation rate in effect at that time was $835.74. Thus, Claimant's hearing loss injury should be compensated at the rate of $835.74 per week, for 13.126 weeks beginning on his last day of employment with Keller in November 1997.

9. Section 12 Timely Notice

A. Upper Extremity Injuries

Section 12(a) of the LHWCA provides that a claimant must give his employer notice of an injury for which compensation is claimed within 30 days of the injury, or within 30 days after the employee is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury and his employment. 33 U.S.C. § 12(a). In the absence of evidence to the contrary, it is presumed that an employer has been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Keller asserts that Claimant knew he had work-related conditions years before he filed his claim because on May 5, 1995, his physician noted that he complained of "stiff hands at work" and "Health education issues [were] discussed." ALJX 6 at 21. However, Claimant asserts that he first learned from Dr. Subin around August 12, 2002 that his upper extremity problems were related to his years of work, and he told Mr. Musso at Global within a few days. CX 3 at 211; Tr at 247-48. Claimant also asserts that neither Employer presented any evidence that he was aware earlier that his upper extremity conditions were work related. ALJX 4 at 66.

I found above that Claimant's upper extremity conditions first became disabling on June 26, 2002. However, it is likely that Claimant did not understand that these conditions were work related until he saw Dr. Subin on August 12, 2002 or later. Although Keller is correct in noting that Claimant complained of upper extremity problems prior to June 2002, the evidence does not support a finding that Claimant should have known his upper extremity problems were work related prior to August 2002. I also find that Claimant told Mr. Musso at Global about his upper extremity injuries within a few days of learning from Dr. Subin that they were work related, since Employers did not rebut Claimant's testimony on this issue. Tr at 247-48. Thus, Claimant

provided Global with notice within 30 days of his awareness that his upper extremity conditions were work related.

B. Hearing Loss

The time for filing a notice of a hearing loss, pursuant to Section 12, does not begin to run until the employee (or his attorney) has received an audiogram and its accompanying report indicating a loss of hearing and is aware of the casual connection between his employment and his loss of hearing. 33 U.S.C. § 908(c)(13)(D); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683 (9th Cir. 1997); *Vaughn v. Ingalls Shipbuilding, Inc*., 28 BRBS 129 (1994)(en banc). Notice must be given within one year after the claimant has received an audiogram with accompanying report. *Cox v. Brady-Hamilton Stevedore Co.*, 18 BRBS 10 (1985).

Keller emphasizes that Claimant's first audiogram was on February 13, 2001. ALJX 6 at 21. However, Claimant asserts that neither employer presented any evidence that he had received an audiogram quantifying and diagnosing his hearing loss as work related prior to when he filed his hearing loss claim. ALJX 4 at 66.

I find that an audiogram was performed on February 13, 2001. GX 13 at 252; CX 3 at 154, 320. Another audiogram was performed on April 13, 2004, and Dr. Goodman issued a report on April 20, 2004. GX 7. Dr. Goodman could not determine that Claimant's hearing loss was work related because he had not reviewed Claimant's MRI to rule out acoustic neuromas or other non-work-related causes. GX 7 at 65. However, there is no evidence that Claimant was ever presented with a copy of either audiogram and/or an accompanying report explaining that his hearing loss was work related. It is unclear if or when Claimant notified either Employer that he had sustained a hearing loss injury, but Employers were at least notified when Claimant filed a claim on February 24, 2003 alleging industrial noise exposure causing hearing loss. GX 1 at 1; ALJX 4 at 65-66. Thus, Claimant provided timely notice of his hearing loss injury, because there is no proof that he received a copy of his audiogram and accompanying report or that he should have been aware that his hearing loss was work related before his claim was filed.

Lack of Showing of Prejudice to Employers

In addition, I note that, even if Claimant had failed to provide timely notice, it would be excused by the lack of prejudice to the Employers.

Failure to give timely notice is excused if the employer had actual notice within the limitations period or the employer was not prejudiced by the lack of timely notice. 33 U.S.C. § 912(d); *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). The employer bears the burden of establishing by substantial evidence that it was prejudiced. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). The primary purposes of the notice requirement are facilitating effective investigations, providing effective medical services, and preventing fraudulent claims. *See Kashuba v. Legion Insurance Co*., 139 F.3d 1273 (9th Cir. 1998). Thus, an employer is prejudiced if it was unable to effectively investigate the alleged injury or to provide effective medical services. *Jones Stevedoring Co.*, 133 F.3d 683. Conclusory statements or mere

allegations of difficulty investigating the claim are insufficient to establish prejudice. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989); *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988).

Claimant asserts that neither Employer presented any evidence that it was prejudiced by any delay. ALJX 4 at 66. Global did not address these issues in its closing brief. ALJX 5. Keller asserts that it was prejudiced because it was unable to obtain a thorough medical exam in 1995. ALJX 6 at 21.

I find that neither Employer has shown by substantial evidence that it was unable to effectively investigate some aspect of the claim due to the claimant's delay in providing notice.

10. Section 13 Timely Filing/Statute of Limitations

A. Upper Extremity Injuries

Section 13(a) provides that a claim must be filed within one year from the time the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and his employment. 33 U.S.C. § 13(a). The awareness provisions of Sections 12 and 13 are identical. *Bivens*, 23 BRBS 233. Although the date a doctor tells a claimant that his injury is work related can be determinative, the appropriate date is the time the claimant should have been aware of such a relationship. *Aurelio v. Louisiana Stevedores*, 22 BRBS 418 (1989); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234 (3d Cir. 1979). A claimant is not "aware" of the relationship between his injury and employment until he knows "the full character, extent and impact of the harm done to him." *Abel v. Director, OWCP*, 932 F.2d 819 (9th Cir. 1991). A claimant is aware of the full character, extent, and impact of his injury when he knows that the injury is work related and knows or should know that the injury will impair his earning power. *Id.* at 821.

I found above that Claimant's upper extremity conditions first became disabling on June 26, 2002. However, it is likely that Claimant did not become aware that they were work related until he saw Dr. Subin on August 12, 2002 or later. Claimant filed a claim on February 24, 2003 alleging cumulative trauma resulting in bilateral carpal tunnel, arthritis, and tendonitis. GX 1 at 1; ALJX 4 at 65-66. Thus, Claimant's claim for upper extremity cumulative trauma was timely filed within one year of his awareness that he had upper extremity conditions that were work related and disabling.

B. Hearing Loss

As with section 12, the time for filing a claim for compensation for hearing loss pursuant to Section 13 does not begin to run until the employee (or his attorney) has received an audiogram and its accompanying report indicating a loss of hearing and is aware of the casual connection between his employment and his loss of hearing. 33 U.S.C. § 908(c)(13)(D); *Jones Stevedoring Co.*, 133 F.3d 683; *Vaughn*, 28 BRBS 129. The claim for hearing loss must be filed

within two years after the claimant has received a copy of his audiogram with accompanying report. *Cox*, 18 BRBS 10.

I find that an audiogram was performed on February 13, 2001. GX 13 at 252; CX 3 at 154, 320. Another audiogram was performed on April 13, 2004, and Dr. Paul Goodman issued a report on April 20, 2004. GX 7. Even at that point, Dr. Goodman could not determine that Claimant's hearing loss was work related because he had not reviewed Claimant's MRI to rule out acoustic neuromas or other non-work-related causes. GX 7 at 65. There is no evidence that Claimant was ever presented with a copy of either audiogram and/or an accompanying report explaining that his hearing loss was work related. Claimant filed his claim on February 24, 2003 alleging industrial noise exposure causing hearing loss. GX 1 at 1; ALJX 4 at 65-66. Thus, Claimant's claim for hearing loss was timely filed, because there is no proof that he received a copy of his audiogram and accompanying report or that Claimant should have been aware that his hearing loss was work related before his claim was filed.

11. Entitlement to Credit

By the parties' stipulation, Global is entitled to a credit of $7,500.00 and Keller is entitled to a credit of $10,000.00 against any liability established in this matter. Tr at 821. Keller also asserts that it is entitled to a credit under section 3(e) for any amounts Claimant obtains in his state worker's compensation or Jones Act cases. Tr at 821-27. There appears to be no dispute between the parties regarding the amounts or entitlement to these credits. The District Director shall ensure that Keller receives a credit against compensation owed for the amounts Keller and Global have already paid.

CONCLUSION

I find that Claimant was a seaman during his employment with Global from 1998 to 2002 and that equitable estoppel does not bar Global from denying Longshore coverage. I also find Claimant was covered by the Longshore Act during his employment with Keller from 1996 to 1997 and that there was an employer-employee relationship between Claimant and Keller during that period. Accordingly, I find that Keller is the last covered employer.

I find that Claimant suffered cumulative trauma throughout his employment that caused, aggravated, or contributed to his upper extremity conditions. I also find that Claimant was exposed to injurious noise throughout his employment that caused, aggravated, or contributed to his hearing loss. Because Keller has not demonstrated what portion of Claimant's injuries is attributable to his subsequent, non-covered employment, Keller, as the last responsible employer, is liable for Claimant's entire disability.

I find that Claimant's upper extremity conditions have not reached MMI, and therefore, he is only entitled to temporary disability compensation. Based on his upper extremity restrictions, I find that Claimant is not capable of returning to his usual work. However, I find that Keller has demonstrated, and Claimant has failed to rebut, the availability of suitable

alternative employment. I find that Claimant has a retained earning capacity of $326.67 per week as of June 2002. I also find that Claimant is entitled to 13.126 weeks of permanent partial disability compensation based on his 6.563 percent binaural hearing loss.

With regard to his upper extremity conditions, I find that Claimant's AWW is $1,409.66. Thus, he is entitled to temporary partial disability compensation at the rate of $721.99 per week beginning June 26, 2002. He is also entitled to temporary total disability compensation at the rate of $939.77 per week from September 10, 2002 through November 26, 2002, and from December 8, 2004 through January 19, 2005. With regard to his hearing loss, I find that Claimant's AWW is $2,130.64 and that his compensation rate is $835.74.

I find that Claimant's claims were not were not untimely noticed under section 12 or untimely filed under section 13. Lastly, I find that Keller is entitled to a credit against compensation owed for the amounts Keller and Global has already paid to Claimant.

ORDER

1. Keller shall pay Claimant temporary partial disability compensation at the rate of $721.99 per week from June 26, 2002 through September 9, 2002; from November 27, 2002 through December 7, 2004; and from January 20, 2005 through the present and continuing until Claimant has received the maximum 5 years of temporary partial disability compensation.

2. Keller shall pay Claimant temporary total disability compensation at the rate of $939.77 per week from September 10, 2002 through November 26, 2002; and from December 8, 2004 through January 19, 2005.

3. Keller shall also pay Claimant a scheduled award for hearing loss at the rate of $835.74 per week for 13.126 weeks beginning on his last day of employment with Keller in November 1997.

4. Keller is liable for medical care related to Claimant's work-related upper extremity conditions and hearing loss.

5. Keller is entitled to a credit for amounts already paid to Claimant by Keller and Global.

6. Keller shall pay Claimant interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.

7. All computations are subject to verification by the District Director, who in addition shall make all calculations necessary to carry out this order.

8. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for Keller within 21 days of the date this Decision and Order is served. Counsel for Keller shall provide the undersigned and Claimant=s counsel a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of Keller's Statement of Objections, Claimant=s counsel shall initiate a verbal discussion with counsel for Keller in an effort to amicably resolve as many of Keller's objections as possible. If all counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Keller's Statement of Objections, Claimant=s counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Keller, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Keller no later than 30 days after service of Keller's Statement of Objections. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

9. The parties will immediately notify this office upon filing an appeal, if any.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:eh